SUPREME COURT. U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 488

UNITED STATES, APPELLANT,

RAYMOND J. WISE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

> FILED OCTOBER 10, 1961 JURISDICTION NOTED DECKMBER 18, 1961

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UNITED STATES, APPELLANT,

VS.

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION

Criminal Action No. 20542

(15 U.S.C. §§ 1 and 13a)

[Returned Sept. 16, 1959]

UNITED STATES OF AMERICA,

VS.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE

Indictment—Sept. 16, 1959

The grand jury charges:

Count One

The Defendant

- 1. National Dairy Products Corporation (hereinafter referred to as "National") is hereby indicted and made a defendant herein. National is a corporation organized and existing under the laws of the State of Delaware, with its executive offices in New York, New York. It is engaged in the business of purchasing, processing, distributing, and selling milk and other dairy products throughout the United States. Prior to December 1, 1956, National conducted its milk operations in the Missouri-Kansas area through its wholly owned subsidiary, the Chapman Dairy Company, a Delaware corporation.
- 2. The acts alleged in this indictment to have been done by National were authorized, ordered, or done by the officers, directors, employees, or agents thereof.

[fol. 2]

Definitions

- 4. Whenever used in this indictment, the term:
- "Milk" means cow's milk produced for sale for human consumption in fluid form as whole milk regardless of its butterfat content and milk byproducts such as cottage cheese and sour cream.

"Distributor" means any person, firm, or corpo-(b) ration engaged in the business of purchasing milk from National at its bottling plant in Kansas City, Missouri, for resale to the distributer's customers.

"Greater Kansas City market" means the coun-(e) ties of Jackson and Clay in Missouri and Wyandotte and Johnson in Kansas.

"Missouri-Kansas area" means those markets in (d) Kansas and Missouri in which milk bottled in National's Kansas City, Missouri plant is sold and distributed. Said area embraces both the Greater Kansas City market and the markets in which such milk is sold by distributors.

"Paola-Osawatomie, Kansas market" means the (11) territory in which distributor Merle Martin sells

milk purchased from National.

"Sedalia, Missouri market" means the territory (f) in which distributor Raymond Newton sold milk purchased from National during the period from about January 1, 1957 through October 1958,

- "Lexington, Missouri market" means the ter-(g) ritory in which distributor Chester Hever sells milk purchased from National.
- "Mexico, Missouri market" means the territory (h) in which distributor Dick Isaacs sells milk purchased from National.
- [fol. 3] (i) "Glasgow, Missouri market" means the territory in which distributor Paul Craig sells milk purchased from National.
- "Butler, Missouri market" means the territory, (i) including the town of Archie, Missouri, in which distributor Clifford Clark sells milk purchased from National.
- "Out-of-State dairy" means any corporation (k)

other than National bottling and selling milk in the Greater Kansas City market whose milk is also regularly sold outside the States of Missouri and Kansas.

(1) "Small dairy" means any corporation, partnership, person, or persons bottling milk exclusively in Missouri or Kansas and whose sales are usually confined within a radius of forty or fifty miles of its bottling plant.

"In-store milk price" means the price at which

milk is sold to stores by a distributor.

Nature of Trade and Commerce

5. The defendant National is the largest dairy corporation in the world. Its world-wide activit s embrace four continents. In each of the years 1957 and 1958, National's sales in the United States and Canada alone totalled approximately one billion, five hundred million dollars, with net profits after taxes of approximately fifty million dollars. National closed the year 1958 with current assets of over two hundred and seventy-five million dollars and total assets of over five hundred and fifty-five million dollars. It has approximately fifty thousand employees. National's operations in the United States are broken down into six operating divisions, including the Sealtest Division, Kraft Foods Division, and four other divisions in related fields. Each of these divisions likewise has its own geographical operating divisions.

6. The Sealtest Division conducts numerous milk, milk by products, and ice cream processing and distributing operations through seven of its own geographical operating divisions. The Scaltest-Central Division is responsible for Scaltest operations in the area generally considered as the midwestern United States, with head offices in Chicago, Illinois. The operations of the Kansas City, Missouri plant of National are under the direction of the Scaltest Central Division."

7. For the past several years National has competed in the Missonri-Kansas area with a number of out-of-State dairies and small dairies. The out-of-State dairies are national concerns which regularly sell milk in a number of sections of the United States, including the States of Missouri and Kansas. Each of the small dairies that competes with National and its distributors in the Missouri-Kansas area has only one bottling plant and is, in many instances, family-owned and operated. The annual sales of these small dairies usually do not exceed \$300,000. Many of these small dairies have annual sales of less than \$100,000 and net assets of less than \$50,000.

8. National's plant in Kansas City, Missouri has used two methods of distributing milk in the Missouri-Kansas area. The first method has been the sale of milk through its own employee drivers directly to stores and home delivery customers. This system has been employed primarily in the Greater Kansas City market. The other method has been the sale of milk in paper carton containers to independent distributors who in turn resell such milk to their own customers, using their own trucks, and their own warehousing and refrigerating facilities. These distributors conduct their business for their own account and profit. Sales through distributors have been made in numerous cities and towns in Kansas and Missouri, for the most part outside of the Greater Kansas City market but within the Missouri-Kansas area.

[fol. 5] 9. During the period covered by this count of this indictment, National's Kansas City, Missouri plant has not normally bottled milk in glass containers for sale to stores. The milk which has been bottled in paper carton containers in National's Kansas City, Missouri plant has been sold and distributed throughout the Missouri-Kansas area. A substantial portion of the milk thus bottled and sold and distributed throughout the Missouri-Kansas area was originally obtained from farms located in Kansas. Likewise substantial portions of the milk bottled in National's Kansas City, Missouri plant and originally produced on farms in Missouri have been sold and distributed in the Kansas pertion of said area. Similarly, numerous competitors of National doing business in the Missouri-Kansas area have secured their milk from producers located in a State or States other than the State in which such milk has been sold or distributed.

10. National has distributorship agreements with various distributors doing business in the States of Missouri and Kansas. Among the distributors having such agreements

with National and purchasing their milk from National's plant in Kansas City, Missouri are Chester Heyer, distribntor for the Lexington, Missouri market; Raymond Newton, distributor for the Sedalia, Missouri market during the period January 1957 through approximately October 1958; Paul Craig, distributor for the Glasgow, Missouri market; Audrain County Dairy, distributor for the Mexico, Missouri market; Merle Martin, distributor for the Paola-Osawatomie, Kansas market; and Clifford Clark, distributor for the Butler, Missouri market. Under said agreements, these distributors have purchased milk from National for resale to their own wholesale and retail customers in their respective markets. These distributors are independent businessmen engaged in purchasing milk and reselling it on their own account for profit. They employ their own personnel, extend their own credit, and own their own trucks and storage facilities,

[fol. 6] 11. During the past several years, a substantial portion of the milk sold by said distributors has been purchased by National from a cooperative or cooperatives obtaining milk from producers located in the States of Kansas and Missouri. The milk produced on farms located in these two States has usually been commingled by the cooperatives and then delivered to National's plant in Kansas City, Missouri where it has been bottled by National. After the milk has been bottled it has, in most instances, been delivered to said distributors by a trucking firm employed by National. A substantial part of such sales and deliveries has been pursuant to price orders placed by the distributors for the purpose of supplying their regular customers and to provide for other anticipated demands. In filling such orders, National has deliveries made regularly to its distributors located in Missouri three or four times each week. Thus, there has been a regular substantial, and continuous flow of milk in interstate commerce from producers in Kansas to distributors selling milk in the State of Missouri. Three or four times each week, for the past several years, distributor Merle Martin has obtained milk from National directly from National's plant in Kansas City, Missouri, and then transported said milk in his own truck into the Paola-Osawatomie, Kansas market, where it has been sold to his customers in that market.

12. During the past several years, substantial amounts of milk sold in markets such as the Lexington, Missouri market, the Sedalia, Missouri market, the Mexico, Missouri market, the Glasgow, Missouri market, and the Butler, Missouri market have come from or have been commingled with milk coming from farms located in the State of Kansas. Likewise, substantial amounts of milk sold in the Paola-Osawatomie, Kansas market have come from or have been commingled with milk coming from farms located in the State of Missouri.

[fols. 7-24] 13. Most of the glass gallon containers and a substantial portion of the paper carton containers used to bottle milk sold in the above-named Missouri markets have come from States other than the State of Missouri.

14. Milk is a perishable commodity and can only be stored in fluid form for a relatively short time prior to its sale and consumption. Accordingly, it must reach the consumer within a short time after its production.

15. Therefore, there has been from day to day a continnous flow of milk in interstate commerce from producers in the States of Kansas and Missouri to the defendant's plant in Kansas City, Missouri, where it is bottled and then transported to distributors, stores, and consumers in the States of Kansas and Missouri, and all within a relatively short period of time.

[fol. 25]

Count Eleven

74. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-defendant

75. Raymond J. Wise (hereinafter referred to as "Wise"), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice president and director of National and

has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-conspirators

76. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive offices located outside the States of Missouri and Kansas, [fol. 26] and their officers and agents are not named as defendants herein but participated as co-conspirators with the defendants in the offense hereinafter charged, and have performed acts and made statements in furtherance thereof.

Offense Charged-Sherman Act

- 77. Beginning in or about September 1957 and continuing until some time in October of 1957, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C.
- 78. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:
 - (a) To hold meetings in Chicago, Illinois and Kansas City, Missouri, to discuss ways and means to:
 - (1) Require the Meyer Sanitary Milk Company to withdraw a certain discount it had offered on or about August 1, 1957 to Milgram Food Stores, one of the largest grocery chains in the Kansas City market; and

- (2) Require the small dairies selling milk in glass gallon containers to narrow the price differential between milk sold in such containers and milk sold in paper cartons.
- [fol. 27] (b) To start a milk price war on or about September 13, 1957 by substantially depressing milk prices;

(e) To limit the milk price war to the Greafer Kansas

City market:

(d) Tō increase their milk prices on or about October 10, 1957 to levels above those prevailing in the Greater Kansas City market prior to September 13, 1957; and

(e) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices on or

about October 10, 1957.

79. During the period of time covered by this count of this indictment and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

- 80. The effects of the aforesaid offense, among others have been:
 - (a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;
 - (b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market:
 - (c) To cause small dairies to sell milk at a loss;
 - (d) To cause small dairies to sustain severe financial losses; and
 - (e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

[fol. 28] Jurisdiction and Venue

81. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Twelve

82. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-defendant

83. Raymond J. Wise (hereinafter referred to as 'Wise'), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice president and director of National and has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-conspirators

84. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive [fol. 29] offices located outside the States of Missouri and Kansas, and their officers and agents are not made defendants herein but participated as co-conspirators with the defendants in the offense hereinafter charged and have performed acts and made statements in furtherance thereof.

Offense Charged-Sherman Act

85. Beginning in or about June 1958 and continuing until about October 1958, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

86. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial

terms of which were that they agree:

(a) To hold meetings to devise plans for depressing, stabilizing, and increasing milk prices in the Greater Kansas City market:

(b) To follow a plan for depressing, stabilizing, and

increasing milk prices by:

- (1) Lowering prices on or about July 14, 1958;
- (2) Raising prices on or about August 27, 1958;
- (3) Raising prices again on or about October 1, 1958:
- (c) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices.

[fols, 30-35] 87. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

88. The effects of the aforesaid offense, among others, have been:

- (a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;
- (b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market:
- (c) To cause small dairies to sell milk at a loss;
- (d) To cause small dairies to sustain severe financial losses; and
- (e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

Jurisdiction and Venue

89. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

[fol. 36] Dated: September 16, 1959

A True Bill: (s) McKinley Wooden Foreman. (s) Robert A. Bicks, Acting Assistant Attorney General. (s) Charles L. Whittinghill, Attorney, Department of Justice. (s) Edward L. Scheuffer, United States Attorney. (s) Earle A. Jinkinson, (s) James E. Mann, (s) Robert L. Eisen, Attorneys, Department of Justice. Room 404, United States Courthouse, Chicago 4, Illinois, WEbster 9-2395.

[fols. 37 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MOTION OF DEFENDANT RAYMOND J. WISE FOR PARTICULARS OF CERTAIN ALLEGATIONS OF THE INDICTMENT—Filed January 22, 1960,

[fol. 39] III

Defendant, Raymond J. Wise, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars, to the extent that said particulars are now known to the United States, of certain allegations of the indictment.

3. As to paragraph 2 of the indictment as the same is realleged in paragraph 74 of Count Eleven and paragraph [fols, 40-42] 82 of Count Twelve, as to paragraph 75 of Count Eleven, as to paragraph 83 of Count Twelve, and, in the alternative, if his motions I A and I B to dismiss Count Thirteen (p. 31) are denied, as to paragraph 2 of the indictment as the same is realleged in paragraph 90 of Count Thirteen, and as to paragraph 91 of Count Thirteen, state whether defendant, Raymond J. Wise, is alleged to have participated in the offense charged other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent. If so, specify (1) each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which be was a director, officer, or agent; and (2) the date and place of each of such acts.

In support of these motions, defendant, Raymond J. Wise, offers his attached Suggestions of applicable authorities.

January 22, 1960.

Respectfully submitted, John T. Chadwell, Richard W. McLaren, Henry W. Buck, William H. Hoffstot, Jr., Attorneys for Defendant, Raymond J. Wise.

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 S. La Salle St., Chicago 3, Ill., Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, Seventeenth Fl. Bryant Bldg., Kansas City 6, Missouri, Telephone: VIctor 2-5910.

Copy of the foregoing Motions of Defendant Raymond J. Wise mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark St., Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant Raymond J. Wise.

[fol. 43] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO THE MOTION OF DEFENDANT RAYMOND J. WISE TO DISMISS COUNTS ELEVEN AND TWELVE OF THE INDICTMENT AS TO HIM—Filed September 19, 1960.

[fols. 44-46] This motion should fail not only because it is filed eight months after the time set by the Court for the filing of all motions, but also because it is completely without merit.

A mere reading of Counts Eleven and Twelve of the indictment shows that the defendant Wise was indicted as

an individual. Paragraphs 75 (Count Eleven) and 83 (Count Twelve) of the indictment specifically name Raymond J. Wise as an individual defendant and then describe his position with National. Furthermore, Section 14 of the Clayton Act is not mentioned in either of these counts, nor for that matter is Section 14 of the Clayton Act ever mentioned anywhere in the indictment.

The charging paragraphs of each of these counts specifically charge Wise with entering into a conspiracy with National and others to fix prices. These paragraphs read in part as follows:

... the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition.

[fol. 47] Earl A. Jinkinson, James E. Mann, Robert L. Eisen, Attorneys, Department of Justice. Room 404, United States Courthouse, Chicago 4, Illinois, WEbster 9-2395.

[fol. 48] [File endersement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

|Title omitted|

Supplemental Motion of Defendant Raymond J. Wise for Particulars of Certain Allegations of Counts Eleven and Twelve of the Indictment—Filed January 24, 1961

Defendant, Raymond J. Wise, pursuant to leave granted, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars concerning certain allegations of Counts Eleven and Twelve of the indictment.

Defendant requests particulars as to the following matters:

- I. As to paragraphs 75 and 77 of Count Eleven and as to paragraphs 83 and 85 of Count Twelve, state whether defendant Raymond J. Wise is alleged to have participated in the offenses charged:
- (a) as an individual acting for his own personal account. If so, specify each act claimed to have been done by defend ant Raymond J. Wise, in his alleged participation in the offense charged which was for his own personal account and not as a director, officer, or agent authorizing, ordering or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.
- [fol. 49] (b) in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed by the corporation of which he was a director, officer or agent. If so, specify each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.
- State each section of the United States Statutes which defendant Raymond J. Wise is charged with having violated.

In support of the foregoing motion defendant, Raymond J. Wise, offers his attached Suggestions of applicable authorities.

Dated: January 24, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell, Richard W. McLaren, Attorneys for Defendant, Raymond J. Wise. Of Counsel: Lashly, Lashly & Miller 705 Olive Street, St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 So. La Salle St., Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Bldg. Kansas City 6, Missouri, Tel: VI 2-5910.

[fol. 49a] [File; endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

MOTION OF DEFENDANT RAYMOND J. WISE TO DISMISS COUNTS ELEVEN AND TWELVE OF THE INDICTMENT AS TO HIM—Filed January 24, 1961

Defendant, Raymond J, Wise, pursuant to leave of Court, moves that Counts' Eleven and Twelve of the indictment be dismissed as to him because they fail to charge him with an offense under Section 1 of the Sherman Act, 26 Stat. 200 (1890), as amended, 15 U.S.C. § 1.

In support of said motion, defendant, Raymond J. Wise, offers his attached Suggestions.

Dated: January 24, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell, Richard W. McLaren, Attorneys for Defendant, Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller, 705 Olive Street, St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South La Salle St., Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kaysas City 6, Missouri, Tel: VI 2-5910.

[fol. 49b] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION *

[Title omitted]

SUGGESTIONS OF DEFENDANT RAYMOND J. WISE IN SUPPORT OF SUPPLEMENTARY MOTION FOR PARTICULARS OF CERTAIN ALLEGATIONS OF COUNTS ELEVEN AND TWELVE OF THE INDICTMENT—Filed January 24, 1961

The defendant, Raymond J. Wise, has filed a supplemental motion for particulars which would clarify the fact that he is not charged with violating Section 1 of the Sherman Act because of conduct in which he engaged as an individual acting for his own account, but solely because of acts performed as a representative of defendant National Dairy Products Corporation.

I. The Allegations of Counts Eleven and Twelve of the Indictment Appear to Charge Defendant Wise Solely With Respect to Acts Performed in a Representative Capacity and the Requested Particulars Should be Granted in Connection With This Defendant's Motion to Dismiss for Failure to Charge an Offense.

Paragraphs 75 and 83 of the indictment identify Wise as one who "... during all of the period covered [by Counts Eleven and Twelve] has been a vice president and director of National and ... actively engaged in the management, direction and control of the affairs, policies, and acts of National ..." These paragraphs go on to state, as the reason why Wise has been named as a defendant, that he "authorized or ordered to be done some or all of the acts alleged ... to have been done by National."

[fol. 49c] Paragraphs 77 and 85 of the indictment contain the ambiguous charge that "... the defendants National and Wise, the co-conspirators [out-of-State dairies], and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition ..." This charge is ambiguous because, under the law, an officer acting within the scope of his employ-

ment cannot conspire with his corporate employer. See e.g. Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F. 2d 911 (5 Cir. 1952), cert. denied 345 U.S. 925 (1953); Goldlawr, Inc. v. Schubert, 169 F. Supp. 677 (E.D Pa. 1958); Marion County Co-op Assn. v. Carnation Co., 114 F. Supp. 58 (W.D. Ark. 1953). In order to make any sense, therefore, this allegation must mean either that Wise is charged as an individual, acting on his own behalf and outside the scope of his employment by defendant National, or that he is charged as a defendant on account of acts performed as a representative of defendant National. We are confident that the Government does not contend—and in fact would vigorously deny—that defendant Wise acted outside the scope of his employment by National.

Accordingly, if the Government is required to furnish the particulars asked in this motion we believe that it will

be forced to admit that

(1) Defendant Wise is not claimed to have participated in the offenses charged as an individual acting for his own personal account;

(2) While defendant Wise is personally charged with engaging in the illegal conduct charged in the indictment, he is alleged to have been acting solely as an officer, director or agent who authorized, ordered [fol. 49d] or did acts constituting in whole or in part the violations alleged to have been committed by defendant National;

(3) Defendant Wise is charged only with having violated Section 1 of the Sherman Act, 15 U.S.C. § 1.

This being so, defendant Wise contends that Counts Eleven and Twelve of the indictment fail to charge him with an offense because Section 1 of the Sherman Act does not impose criminal responsibility upon corporate officials charged only with authorizing, ordering or doing corporate acts constituting a corporate violation. To the contrary, the prosecution of corporate officials for such acts is governed by Section 14 of the Clayton Act, 15 U.S.C. § 24. It is that section, as we shall show, that creates and defines a separate offense under which officers, directors and agents of a corporation, who have authorized, ordered or done

the acts constituting a violation of the antitrust laws by the corporation, are held responsible, and it is that section that specifies the criminal penalties applicable to such officials.

[fol. 49e] Dated: January 24, 1961.

Respectfully submitted, John H. Lashly, John T. Chadwell, Martin J. Purcell, Richard W. McLaren, Attorneys for Defendant, Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller, 705 Olive St., St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 So. La Salle St. Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri, Tel: VI 2-5910.

[fol. 50] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN OF DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

Orner-Filed March 17, 1961

This matter coming on to be heard upon motions of defendants for particulars of certain allegations of the indictment, and upon consideration of suggestions filed on behalf of defendants and countersuggestions filed by the attorneys for the United States, and oral arguments having been heard, and the Court being advised in the premises,

It is Hereby Ordered:

1

1. Paragraph 1 of the supplemental motion of defendant Raymond J. Wise for particulars of certain allegations of Counts Eleven and Twelve is sustained. As to paragraphs 75 and 77 of Count Eleven and as to paragraphs 83 and 85 of Count Twelve, the United States shall state whether defendant Wise is alleged to have participated in the offenses charged:

- (a) as an individual acting for his own personal account. If so, specify each act claimed to have been done by defendant Raymond J. Wise in his alleged participalfols, 51-54 tion in the offense charged which was for his own personal account and not as a director, officer, or agent authorizing, ordering or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.
- (b) in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed by the corporation of which he was a director, officer or agent. If so, specify each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent.
- Paragraph 2 of said supplemental motion of defendant Wise for particulars is denied.

R. Jasper Smith, Judge.

[fol. 55] Entered at Kansas City, Missouri, this — day of March, 1961.

Approved as to form: John T. Chadwell, Attorney for defendants, National Dairy Products, Corporation and Raymond J. Wise, 135 So. LaSalle Street, Chicago 3, Illinois.

Approved as to form: Earl A. Jinkinson, Attorney, Department of Justice, Room 404, United States Court House, Chicago 4, Illinois.

[fol. 56] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 20542-Criminal

UNITED STATES OF AMERICA, Plaintiff,

Versus

NATIONAL DAILY PRODUCTS CORPORATION AND RAYMOND J. Wish, Defendants

Transcript of Proceedings on Hearing Arguments on Sundry Motions—March 6, 1961

APPEARANCES:

Hon. R. Jasper Smith, Judge, Presiding.

For Government: Earl A. Jinkinson, Chief, James Edward Mann, Robert L. Eisen, Trial Altorneys, Department of Justice, Room 404, 219 South Clark St., Chicago 4, Illinois.

For Defendants: John T. Chadwell, Snyder, Chadwell, Keck, Kayser and Ruggles, 135 South LaSalle St., Chicago 3, Illinois. John H. Lashly, Lashly, Lashly & Miller, 705 [fol. 57] Olive Street, St. Louis 1, Missouri. Martin J. Purcell, Richard W. McLaren, Morrison, Hecker, Buck & Cozad, 17th Floor Bryant Building, Kansas City 6, Missouri.

Elsa A. Ripley, Official Reporter.

Be it Remembered that on this 6th day of March, A. D. 1961, arguments on sundry motions heretofore filed herein coming on for hearing before the Honorable R. Jasper Smith, Judge of the United States District Court for the Western District of Missouri, sitting in the Western Division thereof, and the parties appearing in person and/or by counsel as hereinbefore set forth, the following proceedings were had:

The Court: I am not at all cert in that there is any particular occasion to have a formal session on this, although I think probably we might dispose of a number of these matters on the basis of a bench ruling, and then, perhaps a little later on, retire to the library where we can be a little bit informal about it and work out the rest of it.

[fol. 58] RULINGS BY COURT ON DEFENDANT RAYMOND J. WISE'S MOTION TO DISMISS COUNTS ELEVEN AND TWELVE; AND ON SUFFLEMENTARY MOTION FOR PARTICULARS, COUNTS ELEVEN AND TWELVE

Now, I can rule some of these others matters, I think, fairly quickly and in reverse order in the filings that have been done.

The motion of defendant Wise to dismiss Counts Eleven and Twelve will be overruled at this time. I have some serious doubts as to whether those two counts state a cause of action against Wise under the Sherman Act. I think the nature of the allegations that are contained in the Indictment are strongly indicative that the remedy is, in fact, predicated on Section 14 of Clayton, but at this time, in the absence of particulars, I think there is some doubt in connection with it. So the motion to dismiss will be overruled.

However, as a corollary to that, the supplementary motion of the defendant Wise for particulars on certain allegations on Counts Eleven and Twelve will be sustained substantially in their entirety. Now, I say "substantially [fol. 59] in their entirety" because I think when we get back to the relative informality of Chambers discussion, we ought to go over those in detail, because some of them are a little bit - I would say that the vice of the motion, the motion for particulars, as far as Wise is concerned, carries over from the motion in other respects where you get down too much into evidence detail, and I think it is important that that not be into evidence detail but simply a specification to show clearly that the action is directed to the Sherman Act activities as distinguished from the Clayton Act representative responsibility for the personal liability of the officers.

[fol. 60] The Court: Let me make this observation. I am talking now in particular about the supplemental motion of the defendant Wise for particulars as to Counts Eleven and Twelve. Now, that is not for the purpose of affording information to the defendant, as I view it, but it is for the purpose of determining what is charged, so

that there can or cannot be a possible basis for a motion to dismiss on the theory that he is not properly charged under the Sherman Act individually. Now, that is what I want you to get into right after lunch, if you will, because that one bothers me quite considerably. I think it is a troublesome legal question. I am not at all convinced that the aiding and abetting statute is of any help to you at all in that sort of a situation. I think you have to consider whether or not he is charged as an individual, which would be individually responsible under the Sherman Act, or whether he is as an officer of the corporation under Fourteen of the Clayton Act.

[fol. 61] Mr. Mann: Mr. Jinkinson was going to argue that legal question, and likely this afternoon he will do it.

The Court: That is what I am concerned with and I think it demands some sort of a bill of particulars in order to clarify it.

Let's be in recess until two o'clock, Gentlemen.

(Court thereupon stood at recess at 12:55 o'clock p. m. until 2:00 o'clock p. m., at which time proceedings were resumed and continued as follows:)

ARGUMENT BY MR. JINKINSON ON QUESTION OF BILL OF PARTICULARS

Mr. Earl A. Jinkinson: Your Honor raises the question as to the motion by the individual Wise for a bill of particulars in connection with charges One and Twelve of the Indictment. What I want to say at the outset preliminarily is, that counsel has attempted to lead the Court into what I say is a mistaken impression that this is a case of first impression. Quite the contrary. The question of whether or not an individual is indicted under the Sherman Act, under Section 14 of the Clayton Act, has been raised on many occasions. It comes about because of a motion made by the defendants that there is a duplicity, of avowal in the individual defendant being indicted. The individual defendant says, "I can't tell you under which Act I am indicted." The only thing that is novel about the particular [fol. 62] charge of Wise is that Congress in 1955 amended the Sherman Act to increase the fine to \$50,000. But the point of whether he is indicted individually or whether he

is indicted as an officer of the Company, there is nothing to it.

So I say, Your Honor, we then come to the cases. In this respect let me say, while we didn't have the advantage of a brief filed by the Government in a case now pending in the Northern District of Illinois, U. S. v. Natural Gas Company, et al, in which the identical question was raised by Mr. Chadwell in that case. Well, our contention is this, that a reading of the indictment would fairly lead them to believe that Wise is charged as having violated Section One of the Sherman Act and, therefore, he is indicted as an individual and as doing the things charged in the Indietment as an individual. There can be no other fair reading of the Indict-The mere fact that the Indictment contains some language which may have been lifted, maybe not in context but similar to language in Section Fourteen of the Clayton Act doesn't in any manner detract from the fact that the Indictment fairly states that he is indicted for violating Section One of the Sherman Act, not Section Fourteen of the Clayton Act.

[fol. 63] The defendants would like this Court to believe that Section 14 of the Sherman Act has, in some manner, repealed Section 1 of the Sherman Act. Quite the contrary, Your Honor. It hasn't repealed any of the Sherman Act. It has only added to anti-trust enforcement, but it

has not repealed Section 1 of the Sherman Act.

There were several cases decided prior to Section 14 on this very point of what the individual is being charged with. I call the Court's attention to U. S. v. McAndrews and Forbes Company, 149 Fed. 823; appeal dismissed, 212 U. S. 585. The District Court of the Southern District of New York overruled the motion to dismiss certain defendants indicted under the Sherman Act although they had been acting solely in their representative capacity. The Court reasoned at 411 in the Opinion:

"When the statute declares that certain acts unlawfully to be accomplished under modern business conditions only through corporate instrumentalities, shall be listed misdemeanors, and further declares that the word 'prison', as used therein, shall be deemed to include corporations, such statute seems to me to be clearly passed in contemplation of the elementary principle."

[fol. 64] ciple that with respect to a misdemeanor all those who personally aid or abet in its commission are indictable as principals. I am compelled to the conclusion that under this statute that the officer or agent of a corporation charged with fault, be also charged with personal participation, direction or activities therein, both may be so charged in the same indictment."

To similar effect is U. S. v. Winslow, 195 Sup. 578, affirmed 227 U. S. 202. I shall not read from that book but it is to the same effect.

U. S. v. Swift, 188 Fed. 92, Northern District of Illinois, the Court said:

"The answer to this is found"—that is, the action to the Court's dismissal of defendant's objection to the sufficiency of the indictment—"The answer to this is found in the indictment, which charges not that the corporation, but that the group of individual offendants, did what was alleged to be unlawful; and further, that the defendants managed and controlled the various corporations, and directed the corporate action. More was not necessary."—Under the Sherman Act.

Now, Your Honor, let's stop for a minute and just look [fol. 65] very briefly at the legislative history of Section 14, and to buttress my contention that Section 14 of the Clayton Act did not repeal any part of the Sherman Act, was only passed to aid the enforcement of it, I read from some of the colloquy on the House floor between Representatives Floyd and Cooper:

"Mr. Cooper: The title of this Act, 'An act to supplement existing unlawful laws against unlawful restraint and monopolies, and for other purposes.' If I understand the gentleman, it is his contention, in supporting this Conference report, that the criminal clauses of the Sherman Law are still in force and that this Act simply supplements them?

"Mr. Floyd: Certainly; that is correct.

"Mr. Cooper: And that those criminal clauses are not repealed?

"Mr. Floyd: They are not repealed in any sense, and I thank the gentleman for asking the question."

In short, Your Honor, Section 14 was merely passed to reach those offenders who might possibly order something done and then not actually do it themselves. It is very conceivable that the President of, well we will say National Dairies, faced with a situation in Mexico, Missouri, he might just pick up the phone and tell his assistant, "I want [fol. 66] you to straighten that mess out and get in Mexico, Missouri. I don't care how you do it, but get it straightened out." Now, he didn't actually participate in anything, but he ordered it done. Now, this Section 14 was passed to reach a man like that and it never was intended to repeal Section 1 of the Act.

Now, in counsel's brief they cite a colloquy between Senator Kenyon and Senator Culbertson as supporting their contention that Section 14 supersedes Section 1 of the Act, and that Wise should be indicted under Section 14 of this Act, or at least it should be so held. Now, I want to read that, because we cite it also in our brief. Let's see what happened.

Mr. Kenyon said, "The Senator does not claim that Section 1 of the Sherman Act does not penalize the individual."

He answered. That was a very clever answer but he never did answer the question.

Mr. Culbertson said: "What I mean to say is this:—heretofore under the Sherman Act, if a corporation was guilty of a violation of that Act, the guilt of that corporation would not be visited upon the individual director, or agent, or officer, who authorized or committed or induced the act. This Section is intended [fol. 67] to supply that deficiency, or to visit upon the officers or agents of the corporation responsibile for the conduct, punishent for the act of the corporation."

But the Government never answered Senator Kenyon's question, and he didn't contend that Section 1, that is the individual penalties are repealed in Section 1 of the Act. Now, in this case, the instant case in this indictment, it

is alleged that Mr. Wise did the things, alleged in this Indietment. That is, he individually, personally, attended meetings; he conspired with both National and other codefendants, who are not indicted, or co-conspirators not indicted, and I say to this Court that any fair reading of the Indietment will lead one to believe that he was indicted under Section 1 of the Act and not Section 14 of the Clayton Act, and for that reason there is no necessity for submitting any Bill of Particulars whatever.

REPLY ARGUMENT BY MR. CHADWELL

Mr. Chadwell: May 1 reply to that, Your Honor? I don't want to proceed——

The Court: Oh, go ahead. Yes.

Mr. Chacwell: Your Honor, there is no question that Mr. Wise was indicted under Section 1 of the Sherman Act and that he was not indicted under Section 14 of the Clayton [fol. 68] Act. There is no question about that. That is precisely our contention. Our complaint is, if what he did was done in his representative capacity, that is, as a director, officer or agent of National Dairies, he should have been indicted not under Section 1 but under Section 14. Now, that is the point, and for Mr. Jinkinson to get up and say over and over again, that he was indicted under Section 1 doesn't solve the problem before this Court.

Now, Mr. Jinkinson says that Wise is charged with personally violating Section 1. It is charged he violated Section 1 of the Sherman Act. But in the Indictment, as Your Honor has of course observed, it is specifically alleged in these two Counts now before us, in Paragraph 75 of Count Eleven and paragraph 83 of Count Twelve, as follows:

"During all the period covered by this Ceunt of this Indictment, Wise has been a Vice-President and Director of National, and has been within said period and within the last five years actively engaged in the management, direction, control of the affairs, policies and acts of National, and has authorized or ordered to be done some or all of the acts alleged."

Now, those words, "authorized or ordered to be done" are the words of Section 14.

[fol. 69] Now, it is our contention that on the basis of this

allegation in 75 and again in 83 that the Court should dismiss this Indictment under Section 1, because since Mr. Wise is there charged with having acted in his representative capacity, he could only be indicted under Section 14 of the Clayton Act. Now, in order to remove any question on the subject, we have asked the Court to direct the Government to file a Bill of Particulars answering the simple question as to whether it is the Government's contention that Mr. Wise at any time that he was acting here, attending meetings, or whatever he is supposed to have done, at any time did he act in any capacity other than as a director, officer or agent of National Dairy, and if so, to specify the acts that he comitted other than in his representative capacity.

Now, talking about the Bill of Particulars for just a moment, that we have requested, I call the Court's attention to the fact that this precise question is before Judge Minor in the Gas case in Chicago, as Mr. Jinkinson has stated, and I am representing some of the defendants in that case. Now, there are two questions that have been presented to Judge Minor. The first was whether or not we, in that case, were entitled to a bill of particulars sim-[fol. 70] ilar to the Bill which we have requested here, and Judge Minor, over the violent opposition of the Government, ordered the Government to file such a Bill of Particulars. Now, that was done. It isn't pending. That has been decided, as we have said in our Brief.

Now, Judge Minor has not yet decided the motion we filed on the basis of the indictment and the bill of particulars in that case as to whether the indictment could properly have been brought under Section 1, as we charged there, or contended there, as here, that the Section 1 indictment should be dismissed because the indictment, since in that case the individuals were admitted by the bill of particulars and charged in the indictment to have acted only in their representative capacity, the indictment only could have been brought under Section 14. That particular motion which we made, has not been decided by Judge Minor. It has been briefed and hasn't yet been presented orally. He has it on his calendar for oral argument.

Now, Mr. Jinkinson, in arguing the merits as to whether this Section 14 motion is good or bad, assuming that Mr. Wise was acting only in a representative capacity, does not answer our contention that he should file this Bill of Par[fol.74] ticulars, so that question will be cleared up, although it is my earnest contention to the Court that in view of the allegations of Paragraphs 75 and 83, which I stated at the outset of my argument. I believe we are entitled to this dismissal in any event.

Now, Mr. Jinkinson has hurriedly, and I feel sure in-advertently, covered two or three cases here which he has argued to the Court, reach a result contrary to what we are contending for, and they are two or three old cases. One is the Winslow case and one is the Swift case. Now, in both of those cases, which he cited to the Court,—the Winslow case is 195 Fed. 578, and the Swift case is 188 Fed. 92—in both of those cases it was contended and alleged that the individual was acting in his personal capacity, through a corporation which had been organized as a device for carrying out his personal illegal activities.

In the Winslow case, the indictment charged the individual "caused to be organized and took an active part in the organization of a corporation"—I am short-cutting; this is the gist of it—"of a corporation as a device, for their own individual monopolization of the Schumach ma-

chinery business." That was Winslow,

Now, in Swift there was a similar allegation in the indict-[fol. 72] ment,—the individuals "carried on, directed and controlled said portions of said industry by the device of and means of and through and in the names of certain corporations" and so forth. An entirely different situation.

Now, I also call the Court's attention to the fact that in the colloquy, which we have quoted in our Brief—I am not going to re-argue the Brief because I know Your Honor has read it carefully—but in that colloquy, here in Chairman Culbertson, Senator Culbertson, who was Chairman of the Committee that put through this Section 14 back in 1914, Section 14 of the Clayton Act, and he expressly made it clear precisely what they were trying to do, and he couldn't have stated it in clearer language, and I am not going to quote it because we have got it in our Brief. And, as I stated to the Court, it seems to me that Congress has recently made clear that they considered the two sections entirely separate and different,—one, in increasing the fine,

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the possible maximum fine, under Section 1, provided in Section 1, there is a \$50,000 maximum, and at the same time Section 14 carries a \$5,000,00 maximum. The precise question that is before the Court here didn't have the significance prior to 1955 at the time of that ameadment, that [fol. 73] it does today, and so far as I know, if your Honor please, since this amendment in 1955, and prior thereto so far as I knew, this precise question as to whether an executive or officer of a corporation, charged individually it is true but having acted only in his representative capacity, as to whether he can be indicted under Section 1 of the Sherman Act, so far as I know this is strictly a question of first impression before Your Honor in this case and before Judge Minor in Chicago in the Gas case. So far as I know that is true, and I do not believe that Mr. Jinkinson has cited any case in his remarks before Your Honor indicating to the contrary.

Those cases, which I have mentioned, are entirely different cases. The acts which were alleged were in the individual capacity, for individual purposes and businesses and the corporations were used merely as a device.

I strongly urge to the Court that if the Court has any question about our right to have this motion granted as to the defendant Wise, Mr. Jinkinson can very easily state this:- is he charging that Mr. Wise acted in any capacity other than his representative capacity, in the words of our motion, and if so, what acts did he do other than as an [fol. 74] officer, director or agent of National Dairy, and I will guarantee to the Court that he won't say that Mr. Wise acted in anywise other than in that capacity because he knows he can't prove it. Mr. Wise had no business of his own; he wasn't down here at any time serving his own business, nor was he an individual operator. Anything that he did, anything that they can prove that he did, legal or illegal, he did it as an officer, director or agent of National Dairy, and that Mr. Jinkinson knows, and he can't evade the issue by saying that he acted individually or acted personally. Of course he did. He was here; he did it. Mr. Wise walked in the door and attended the meeting. But, in what capacity did he do it? And that is the question before the Court, and I strongly urge to the Court that this is a serious matter for an individual to be indicted in one of these cases, and I think that he is entitled to this protection that the law gives him, and I strongly arge to the Court that both these motions should be granted.

ADDITIONAL ARRUMENT BY MR. JINKINSON

Mr. Jinkinson: If the Court please, I want to be heard briefly. I may not have followed Mr. Chadwell very closely, but I cite to him U.S. v. Atlantic Commission, 45 Fed. Supp. 187. Paragraph 10 of that indictment says:

[fol. 75] "" any act, deed, or transaction on the part of any corporate defendant," shall be deemed to mean that the officers, agents, and employees of said corporation, and its subsidiaries and affiliates, ordered or did such act. for and on behalf of said corporation while actively engaged in the management, direction, and control of its affairs."

Under Sections 1 and 2 of the Act, defendants demurred on the ground that the indictment was duplicitous in that it alleged the offenses under Section 1 and 2 of the Sherman Act and Section 14 of the Clayton Act despite the fact that Section 14 was not mentioned in the indictment.

And I say that that squarely raises the point that Mr. Chadwell is contending for here. In one instance the fine is now \$50,000 and it used to be Five and Five; now it is Fifty and Five. But I think the thing is squarely raised. I don't see how it could be more squarely raised. And in that case the Court overfuled the motion.

Now, there are many cases cited which allege that defendants are indicted in almost the language of Section 14, and they have all been held to charge a violation of Section 1 or 2 of the Sherman Act.—I am not going to confol, 761 time reading these reports, but may I just pass this Brief up to you? It is in another case, but I think covers the identical point. You will find an Appendix listing ten or twelve different cases, in which, for example page 28, the indictment reads as follows:

"The following named individuals are hereby indicted and made defendants herein. Each of said defendants is and has been during the period of time covered by this indictment, associated with a defendant corporation in the capacity indicated below. Each of such individuals has authorized, ordered, or done some or all of the acts constituting the offense hereinafter charged."

"6. Whenever in this indictment it is alleged that a defendant corporation did or performed any act, deed, or thing, such allegations shall be deemed to mean that such act, deed, or thing was authorized, ordered, or done by an officer, director, employee, or agent thereof, including but not limited to the natural persons named defendants herein, for or on behalf of said defendant corporation while actively engaged in the management, [fol. 77] direction, and control of its affairs."

Now, as Your Honor said this merning, the Government is not going to get any comfort out of Title 18, Section 2. I submit, Your Honor, that I think that the Dallas case is controlling on the point counsel raises, because after all, as the Supreme Court said, 320 U.S. 277, p. 281:

"The only way that a corporation can act is through individuals, who act on its behalf, and the historic conception of a misdemeanor makes all responsible for it (the misdemeanor) equally guilty."

a doctrine given general application in Fed. 18, Sec. 244.

Now, there are a number of cases holding that an individual may be held criminally liable for acts done in corporation business. U.S. v. Colosse Cheese and Butter Co., 133 Fed. Supp. 953, Northern District of New York. The Court stated at page 955:

"It is also well settled that corporate agents may be held criminally liable for acts done on behalf of the corporation."

So I say to Your Honor, I don't understand how the Government can separate Mr. Wise from his corporate capacity as the Vice-President of National Dairy Company as separate from his own individual self. It is impossible [fol. 78] to divide a man that way; say, this part is Mr.

Wise; this part is National Dairy. If he acts on the part of the corporation, he is just as equally criminally liable in his individual capacity as he is as an officer with the corporation.

ORAL RULING OVERBULING MOTION OF RAYMOND J. WISE TO DISMISS COUNTS ELEVEN AND TWELVE AND SUSTAINING MOTION FOR BILL OF PARTICULARS

The Court: Gentlemen, I indicated previously what my viewpoint was on these matters.

The motion of defendant Wise to dismiss Counts Eleven

and Twelve as to him will be overruled.

The supplemental motion for a bill of particulars of certain allegations of Counts Eleven and Twelve will be sustained in such fashion as we later agree on.

[fol. 79] Colloquy Between Court and Counsel

The Court: Now then, there is one other Bill of Particulars. I don't know whether we have covered it specifically. Mr. Chadwell: The Supplemental Bill filed by Mr. Wise?

The Court: Yes.

Mr. Chadwell: As I understand, Your Honor granted the Supplemental Bill, but not the request we made previously, and the order made by the Court will be merely on the basis of the Supplemental Bill and nothing beyond.

The Court: I am not sure that I follow you when you

refer to the request you made earlier.

[fol. 80] Mr. Chadwell: There were some requests, I believe, in some earlier papers dealing with Paragraphs 11 and 12, but the order, as I understood Your Honor's ruling, the order would be, would direct the Government to answer the particulars requested in the—I don't believe I have it in front of me—

The Court: The only modification of that is as it relates to request No. 2.

Mr. Jinkinson: Is it as to the statute which the defendant-

The Court: Yes, because the Indictment already charges

Section 1 of the Sherman Act. I don't understand by the Bill of Particulars, you could amend the Indictment to that extent, by changing the words.

Mr. Chadwell: I don't think so. Mr. Jinkinson made it very clear in his argument today that they are only charging him under Section 1. I don't think that is important. I am sorry, I don't have a copy of that paper right in front of me. Here it is. I am sorry; I have got it right here.

No,—I don't know what has happened to it—it has gotten away from me. Oh, yes. The order, if agreeable to the Court, will be in the words 1-a and 1-b, and 2 will be omitted.

[fol. 81] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 82] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

BILL OF PARTICULARS-Filed April 8, 1961

Comes now the United States and files this bill of partienlars in response to the order of this Court dated March 17, 1961 granting in part the motions of the defendants for a bill of particulars. The Government's bill of particulars to the extent of its present knowledge is as follows:

1

Answer to Paragraph 1(a) and (b)

It is alleged that the defendant Wise is personally charged with actively and directly engaging in the illegal conduct charged in Counts Eleven and Twelve of the indictment. The Government states that the defendant Wise, in actively and directly engaging in the alleged offenses, is alleged to have been acting solely in his capacity as an

officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by National Dairy Products Corporation of which he was an officer, director, or agent.

[fol: 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omifted]

RENEWED MOTION OF DEFENDANT RAYMOND J. WISE TO DIS-MISS COUNTS ELEVEN AND TWELVE AS TO HIM-Filed April 19, 1961

Defendant, Raymond J. Wise, renews his motion for an order dismissing Counts Eleven and Twelve of the Indietment as to him on the ground that said counts, in themselves and as made more specific by Bill of Particulars dated April 10, 1961, filed by the Government, fail to charge him with an offense under Section 1 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1.

In support of said renewed motion to dismiss, defendant Raymond J. Wise offers his attached Suggestions.

Dated: April 19, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell, Richard W. McLaren, Attorneys for Defendant, Raymond J. Wise.

Of Counsel: Lashly, Lashly & Miller, 705 Olive Street, St. Louis 1, Missouri, Tel: MAin 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th floor, Bryant Building, Kansas City 6, Missouri, Tel: VI 2-5910. [fol. 84] [File endorsement omitted]

In the United States District Court for the Western District of Missouri, Western Division

[Title omitted]

SUGGESTIONS OF DEFENDANT RAYMOND J. WISE IN SUPPORT OF RENEWED MOTION TO DISMISS COUNTS ELEVEN AND TWELVE OF THE INDICTMENT AS TO HIM—Filed April 19, 1961

[fol. 85]

Argument

A. The Indictment Does Not Charge Defendant Wise with an Offense under The Sherman Act

The issue between the Government and defendant Wise is clearly drawn. Defendant Wise contends that Section 1 of the Sherman Act applies only to an individual acting for his own personal account, and that where an individual is charged, as he is here, with "acting solely in his capacity as an officer, director, or agent who authorized, ordered or did some of the acts constituting . . . the violations alleged . . . ," he must be charged under Section 14 of the Clayton Act. (For the authorities supporting this proposition, this defendant respectfully refers the Court to his Suggestions filed in support of his prior Motion to Dismiss and in support of his Supplemental Motion for Particulars, both dated January 24, 1961).

The Government's position is that it may charge an officer, director or agent with violation of the Sherman Act if, although acting in his representative capacity, he "actively and directly engag[ed] in the illegal conduct charged." But any corporate official who authorizes, orders, or does some of the challenged acts must be deemed to be "actively and directly" engaged in the illegal conduct charged.

[fol. 86] Dated: April 19, 1961.

John H. Lashly, John T. Chadwell, Martin J. Purcell, Richard W. McLaren, Attorneys for Defendant, Raymond J. Wise. Of Counsel: Lashly, Lashly & Miller, 705 Olive Street, St. Louis 1, Missouri, Tel: MA:n 1-2939. Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago 3, Illinois, Tel: RA 6-2545. Morrison, Hecker, Buck & Cozad, 17th floor, Bryant Building, Kansas City 6, Missouri, Tel: VI 2-5910.

[fol. 87] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 20742

UNITED STATES OF AMERICA, Plaintiff,

1.5

National Dairy Products Corporation and Raymond J. Wise, Defendants

MEMORANDUM AND ORDER-June 14, 1961

Several motions filed by defendants are pending for ruling.

1

Defendant Wise has renewed his motion to dismiss Counts 11 and 12 (Section 1, Sherman Act Counts) of the indictment. This motion was submitted earlier and was overruled on March 6, 1961. Leave was given at that time to refile the motion after the Government had filed its bill of particulars.

In the motion defendant contends that he cannot be properly indicted under Section 1 of the Sherman Act, Section 1, Title 15, U.S.C.A., for acts done on behalf of and as a representative of his corporate employer National Dairy Products Corporation, when the acts are alleged to constitute a violation of Section 1 by the corporation. Defendant contends that in such circumstances, he must be indicted under Section 14 of the Clayton Act, Section 24, Title 18, U.S.C.A.

The motion tenders a complicated question as to criminal

liability and responsibility of a corporate officer under the statutory framework of the anti-trust laws. Under cases cited by the parties, 41 is apparent that much doubt and uncertainty existed prior to the enactment of Section 14 [fol. 88] of the Clayton Act. See, for example, United States v. McAndrews & Forbes Co., 149 F. 823 (S.D. N.Y. 1966); Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir. 1969); United States v. Swift, 188 F. 92 N.D. III. 1911); Nash vs. United States, 229 U.S. 373 (1913).

Since enactment of Section 14, several cases have involved that section, but in none of them have the courts been faced squarely with the issue presented here, namely, whether the Sherman Act or Section 14 of the Clayton Act governs the prosecution of a corporate officer, charged under the anti-trust laws solely because he authorized, ordered or did acts constituting a corporate violation. A number of cases since 1914, the date of enactment of Section 14 of the Clayton Act, have recognized the applicability of that statute where individual defendants as officers having active management, direction and control of the corporation, have been indicted. See United States vs. Atlantic Commission Company, 45 F. Supp. 187 (E.D. N.C. 1942); United States vs. General Motors Corporation, 26 F. Supp. 353 (N.D. Ind. 1939). See also Hartford Empire Company vs. United States, 323 U.S. 386 (1945). In those cases the problem was not, as here, highlighted by the fact that in 1955, Congress raised the fine provided by Section 1 of the Sherman Act while not disturbing the fine provided by Section 14 of the Clayton Act.

Here we have a situation where the principal and an employee are both charged with violation of Section 1 of the Sherman Act. Nothing in the indictment specifically alleged that defendant Wise was acting in an individual capacity, and the broad inference of the indictment was that he acted solely within the scope of Section 14 of the Clayton Act. In that posture a bill of particulars was ordered, and in the bill it was stated that, "* * * the defendant Wise, in actively and directly engaging in the alleged offenses, is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, [fol. 89] ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been

committed by National Dairy Products Corporation of which he was an officer, director, or agent."

While it is undoubtedly true that a bill of particulars does not occupy the status of an amendment to an indictment, it may be considered in determining ambiguous language; and under those circumstances it seems perfectly clear that the sole issue presented now is whether or not an individual, charged solely in his representative capacity and not in any degree on an individual basis for his own personal account, may be charged with a violation of Section 1 of the Sherman Act.

It is my view that he cannot. There can be no question but that confusion and uncertainty existed prior to 1914 when Section 14 was enacted. Equally, there can be no question but that Congress in enacting Section 14, the "personal guilt" provision, intended to eliminate that uncertainty and confusion. It is clear that since 1914 it constituted no problem until the amendment to the punishment section for Section 1; and the fact that no challenge has been made of the question during that time is of little significance. Under clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and pumishment of individuals who, as corporate officials, took part in the corporate violation. This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force.

[fol. 90] The motion of defendant Wise to dismiss Counts 11 and 12 as to him is sustained. Counsel for the Government will prepare appropriate order of dismissal within fifteen (15) days.

11

In view of the ruling on the motion to dismiss, the alternative motion of defendant Wise for severance and separate trial of Counts 11 and 12 is overruled. For the same reason,

the alternative motion of defendant Wise joining in certain additional motions of defendant National is overruled.

111

Defendant National has moved for an order directing compliance with the Court's order of March 17, 1961, requiring particulars. As it relates to the particulars set forth in Part II, 1(b) and 3(d), the motion is overruled. As it relates to Part II, 2 and 3(a), it is my view that the Government has not complied with the order of March 17, 1961, requiring particulars, and the motion is therefore sustained, and the Government is directed to file supplemental particulars within thirty (30) days.

As it relates to Part III, 3(b), the Government has conceded that through inadvertence a portion of the material required was omitted. To the extent of the omitted portion, the motion is therefore sustained as to this part, but as to all other portions of 3(b) of Part III, the motion is overruled.

IV

Defendant National has moved for entry of a pre-trial order with a proposed form of order. This motion is premature and is overruled. At an appropriate time this case will be scheduled for a pre-trial conference and at that time an order will be formulated controlling the issues and the manner of presentation of each party's case.

[fol. 91] V

Defendant National has moved for an order directing issuance of subpoena duces tecum to certain third parties to be returnable in advance of trial. These motions are sustained and the Clerk is directed at such time as is requested by defendant to issue the subpoenas duces tecum to the parties named in the motion and supplemental motion filed by defendant, to be returnable fifteen (15) days in advance of trial in accordance with the motions.

VI

Defendant National has moved, purportedly under Rule 17(c), for the production of certain documents not obtained

by the Government by process but which were presented to the grand jury or which are to be offered in evidence upon the trial.

This motion is overruled. Undoubtedly this goes beyond the scope of permissible discovery in criminal cases. Under certain sharply restricted circumstances, in the interests of justice, it is sometimes necessary to disclose evidence that has been presented to a grand jury but no good cause is shown here.

It is so Ordered.

R. Jasper Smith, District Judge.

Kansas City, Missonri, June 14, 1961.

[fol. 92] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Criminal Action No. 20542

UNITED STATES OF AMERICA,

٧.

National Daily Products Corporation and Raymond J. Wise, Defendants

Order Dismissing Counts Eleven and Twelve as to the Defendant Raymond J. Wise—August 10, 1961

Upon the renewed motion of the defendant Raymond J. Wise to dismiss Counts Eleven and Twelve of the indictment as to him, and the Court having considered such motion, together with briefs filed in support thereof and in opposition thereto, and having considered the indictment and bills of particulars filed by the United States of America, and the Court being fully advised in the premises, Finds and Holds:

That the defendant Wise is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by defendant National Dairy Products Corporation of which he was an officer, director, or agent; that accordingly he cannot be charged on the basis of such acts with a violation of Section 1 of the Sherman Act, and since [fol. 93] the Government charges him and represents that it intends to charge him only under Section 1 of the Sherman Act in Counts Eleven and Twelve of the indictment, his renewed motion to dismiss said counts should be and hereby is sustained.

It is, Therefore, Ordered that Counts Eleven and Twelve of the above entitled indictment be and they hereby are dismissed as to the individual defendant Raymond J. Wise.

Enter:

R. Jasper Smith, United States District Judge.

Dated: August 10, 1961.

[fol. 94] | File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

Notice of Appeal to the Supreme Court of the United States-Filed August 14, 1961

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order entered in this action on August 10, 1961, dismissing counts 11 and 12 of the indictment, insofar as they charged defendant Raymond J. Wise with violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States and include in said transcript the following:

A. The Indictment.

B. Motion of Defendant Raymond J. Wise to Dismiss Count Thirteen of the Indictment, to Strike Certain Material From the Indictment and For Certiculars of Certain Allegations of the Indictment, dated January 22, 1960.

C. Motion of Defendant, Raymond J. Wise for Leave to File Supplemental Motion for Bill of Particulars and Motion to Dismiss Counts 11 and 12 of the Indict-

ment as to Him dated August 19, 1960.

D. Order of March 17, 1961.

E. Transcript of Proceedings, March 6, 1961.

F. Renewed Motion of Defendant, Raymond J. Wise to Dismiss counts 11 and 12 of the Indictment as to Him, dated April 19, 1961.

G. Memorandum and Order entered June 14, 1961, dismissing counts 11 and 12 of the indictment as to defendant Raymond J. Wise.

H. Formal Order of Dismissal entered August 10, 1961.

[fol. 95] III. The following question is presented by this appeal:

Whether the district court properly dismissed an indictment charging that a corporate officer acting in his corporate capacity participated in a combination and conspiracy to violate Section 1 of the Sherman Act, 15 U.S.C. 1, on grounds that the Sherman Act is applicable to individuals only where they are acting in their own behalf and that corporate officers acting in their representative capacity can only be charged with a violation of Section 14 of the Clayton Act, 15 U.S.C. 24.

Earl A. Jinkinson, Chief, Chicago Office, Antitrust Division, Department of Justice. J. Edward Mann, Robert L. Eisen, Attorney. [fol. 96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Order Noting Probable Jurisdiction—December 18, 1961

Appeal from the United States District Court for the Western District of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

December 18, 1961.

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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1961

United States of America, appellant

RAYMOND J. WISE

APPRAL FROM THE UNITED STATES DISTRICT COURT SOR THE WESTBRY DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

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nt of Jupiter, Washington 26, D.O.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. -

UNITED STATES OF AMERICA, APPELLANT

ľ.

RAYMOND J. WISE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINION BELOW

The memorandum and order of the district court (Appendix A, infra, pp. 20-25) is not yet reported.

JURISDICTION

The indictment was filed under Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. 1) and Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C. 13a). The order of the district court dismissing counts 11 and 12 of the indictment as to the appellee Wise, on the ground that Section 1 of the Sherman Act does not apply to the offenses charged against him, was entered on August 10, 1961 (Appendix B, infra, pp. 25-26), and the

notice of appeal was filed on August 11, 1961.¹ The jurisdiction of this Court to review by direct appeal the order of dismissal is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. United States v. Hutcheson, 312 U.S. 219; United States v. Borden Co., 308 U.S. 188.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, provides:

That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have au-

¹ The district court had previously dismissed the counts charging the National Dairy Products Corporation and Wise with violations of Section 3 of the Robinson-Patman Act, on the ground that that section is unconstitutionally vague. The government's appeal to this Court from that dismissal is pending on motion to dismiss or affirm. No. 173, this Term.

thorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine or not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATEMENT

Counts 11 and 12 of the indictment in this case (filed on September 16, 1959) charged the National Dairy Products Corporation ("National") and appellee Wise, a vice president and director thereof, with conspiring, together with designated co-conspirators and unknown persons, to eliminate price competition in the sale of fluid milk in the Kansas City area, in violation of Section 1 of the Sherman Act. Each of these counts alleged that, during the period covered thereby, Wise had been "actively engaged in the management, direction, and conduct of the affairs, policies and acts of National, and has authorized or ordered to be done some or all of the acts alleged * * * to have been done by National" (R. 25, 28).

On August 19, 1960, Wise moved to dismiss counts 11 and 12 as to him on the ground that "they fail to charge him with an offense under Section 1 of the

^{18 &}quot;R." refers to the record and "S.R." to the supplemental record on file in the Clerk's Office.

Sherman Act * * * " (S.R. 1). In a supporting statement he alleged that "Section 1 of the Sherman Act does not impose criminal responsibility upon corporate officers charged only with authorizing, ordering or doing corporate acts constituting a corporate violation. To the contrary, the prosecution of corporate officers for such acts is governed by Section 14 of the Clayton Act, 15 U.S.C., § 24" (S.R. 7). Wise also moved for a bill of particulars requiring the government to state, among other things, whether he was alleged to have participated in the offenses charged against him in those counts "in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed" by National (R. 40).

6

The district court denied the motion to dismiss, but sustained the motion for particulars insofar as it requested the foregoing information (R. 50). In response, the United States stated that Wise "is personally charged with actively and directly engaging in the illegal conduct charged in Counts Eleven and Twelve of the indictment," and that, in doing so, he was "acting solely in his capacity as an officer, director or agent who authorized, ordered or did some of the acts constituting in whole or in part the violations alleged also to have been committed" by National (R. 57).

Wise then renewed his motion to dismiss on the ground that "said counts, in themselves and as made more specific by [the] Bill of Particulars " " fail to charge him with an offense under Section 1 of the

Sherman Act * * *" (R. 58). The district court granted the motion and, on August 10, 1961, entered an order dismissing counts 11 and 12 as to Wise (App. B, infra, pp. 25=26).

The court held that a corporate officer, "charged solely in his representative capacity and not in any degree on an individual basis for his own personal account," may not be prosecuted under Section 1 of the Sherman Act, but only under Section 14 of the Clayton Act (App. A, infra, p. 22). The court ruled (id., pp. 22-23) that "the Sherman Act governs the prosecution and punishment, of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation." In its order of dismissal, the court stated (App. B, infra, p. 26) that Wise "cannot be charged" with a violation of Section 1 of the Sherman Act "on the basis of" acts committed by him "solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed" by National.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question of first impression regarding the inter-relationship of Section 1 of the Sherman Act and Section 14 of the Clayton Act with respect to the criminal liability of corporate officials for antitrust violations committed in the course of their corporate duties. Section 1 of

the Sherman Act provides that "[e]very person" who engages in an illegal conspiracy or combination in restraint of trade is guilty of a misdemeanor and, upon conviction, may be fined up to \$50,000, or imprisoned up to one year, or both; and Section 7 of that Act defines "person" to include "corporations" and "associations." Section 14 of the Clayton Act provides that, whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation"; makes such violation a misdemeanor; and imposes a maximum fine of \$5,000, or maximum imprisonment of one year, or both. The district court held that a corporate official may not be prosecuted under Section 1 of the Sherman Act for antitrust violations committed by him in his corporate capacity, but only under Section 14 of the Clayton Act.

The effect of this ruling is that such officials are subject only to the \$5,000 maximum fine provided by Section 14, and not to the \$50,000 maximum fine imposed by the Sherman Act. In addition, the requirement that the government proceed under Section 14 against the officials, while at the same time proceeding under the Sherman Act against the corporation, would create various problems at the trial. See note 11, infra, p. 18.

The novel holding of the district court rests upon a basic misconception of the purpose which Con-

gress intended Section 14 to serve. Contrary to the view of the court below, Section 14 was not designed to eliminate "confusion and uncertainty" (App. A. infra, p. 22) that had existed as to whether corporate officials were criminally liable under the Sherman Act; such liability was already established when the Clayton Act was enacted in 1914. The primary purpose of Section 14 was to strengthen the criminal prohibitions of the antitrust laws so as to reach conduct by corporate officials which might not otherwise constitute a violation of the Sherman Act, either because such individuals had not personally and directly participated in the corporate violations, or because their conduct was not sufficient to make them parties to the illegal conspiracy. To achieve this end, Congress provided in Section 14 that corporate officers, directors or agents were to be criminally liable if they authorized, ordered or did any of the acts constituting in whole or in part the corporate violation. It did not, however, thereby abolish the criminal liability to which corporate officials were already subject for Sherman Act violations committed in their corporate capacities.

1. Prior to the enactment of the Clayton Act in 1914, the criminal liability of corporate officials for violations of the Sherman Act had been repeatedly recognized. In many of the early criminal cases under the Sherman Act, the validity of an indictment charging both the corporation and its officers under Section 1 was accepted without challenge. See e.g., United States v. New Departure Manufacturing

Co., 204 Fed. 107 (W.D. N.Y., 1913). As early as 1906, it was held that the unqualified language in Section 1, that "[e]very person" who engaged in a combination or conspiracy in restraint of trade was guilty of a misdemeanor, covered not only corporations but also corporate officials who had participated in their company's violations. In the leading case of United States v. MacAndrews & Forbes Co., 149 Fed. 823 (S.D. N.Y., 1906), the indictment charged two corporations and their respective presidents with conspiring to restrain trade, although the officers were alleged to have acted solely in behalf of their companies. In rejecting the contention that the individuals and the corporations had been improperly joined in the same indictment (the claim being that either the corprations, or their presidents, but not both, had a mitted the crimes charged), the court stated (p. 832, emphasis added):

> When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemanors [sic] and further declares that the word "person" as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. * * * I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment. * * *

In United States v. Winslow, 195 Fed. 578 (D. Mass., 1912), two indictments charged that corporate officials who were "actively engaged in the management of the business and affairs of [their] companies," but not the companies, had violated Sections 1 and 2 of the Sherman Act. In denying motions to dismiss based on the claim that the Sherman Act did not apply to individuals who "are only officers or directors" of their corporations, the court relied on the principle (which the court had also relied on in the MacAndrews case, supra) that "all parties active in promoting a misdemeanor, whether agents or not, are principals," and concluded that an officer cannot "protect himself behind a corporation where he is the actual, present, and efficient actor" (195 Fed. at 581). In United States v. Patterson, 201 Fed. 697 (S.D. Ohio, 1912), affirmed, 222 Fed. 599 (C.A. 6), the court upheld an indictment charging a large number of corporate officers and employees, whose position ranged from president to salesman, with violating Sections 1 and 2 of the Sherman Act. See also United States v. Swift, 188 Fed. 92 (N.D. Ill., 1911).2

² The district court below also cited Nash v. United States, 229 U.S. 373, and Union Pacific Coal Company v. United States, 173 Fed. 737 (C.A. 8), as having cast "doubt and uncertainty" on whether, prior to the Clayton Act, corporate officials were criminally liable under the Sherman Act (App. A, infra, p. 21). Neither case so indicated.

In Nash, corporate officials and their corporations were indicted for violating Sections 1 and 2 of the Sherman Act. Four of the officials were convicted, but the jury could not reach a verdict with respect to the corporation. In this Court,

It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done

2. The Clayton Act was designed to close various loopholes that had developed in the Sherman Act. The purpose of Section 14, as stated by Representative Floyd, the member of the House Judiciary Committee who was the floor spokesman for that provi-

on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them [the corporations] ought to be set aside. * * * [229 U.S. 379.]

The Court, however, found it unnecessary to "consider * * * whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reversed for another reason" (*ibid.*).

Any doubt which this Court may have had in Nash as to the guilt of the corporate officers was not as to the propriety of prosecuting them under the Sherman Act, but as to the validity of convicting them and not the corporations in circumstances indicating "that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it".

In Union Pacific Coal Company v. United States, supra, 173 Fed. at 744-745, the question was whether a single officer of a corporation could engage in an unlawful combination with his corporation to violate the antitrust laws, in a situation in which "the evidence was insufficient to sustain a conviction of either of them [the coal corporation or the individual] of an unlawful combination with Buckingham [an agent of two defendant railroad companies] or with either of the railroad companies" (173 Fed. at 744). The court, in holding that he could not, made clear that if more than one individual defendant had been guilty of the illegal acts or if a corporate defendant other than the one which employed the single individual had been similarly guilty, a conviction could have been sustained.

1

sion, "was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered or did the thing prohibited should be guilty" (51 Cong. Rec. 9609). Representative Floyd repeatedly pointed out to the House that Section 14 went beyond the prohibitions in the Sherman Act, since the latter already provided penalties for antitrust violations committed by corporate officials, and that Section 14 was not a substitute for, but rather was a supplement to, the existing criminal penalties imposed by the Sherman Act on corporate officials."

Thus, he stated that "[u]nder the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty" (51 Cong. Rec. 9609); that Section 14 "in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law, he can be indicted independently of this provision * * * " (51 Cong. Rec. 9679); and that corporate officials who "commit acts held to be unlawful" would continue to be liable under the Sherman Act, with the new provision reaching the other responsible corporate officials "we cannot now reach

³ Representative Floyd was the principal spokesman in the House for the proponents of Section 14. In addition, Representative Lenroot, in introducing a clarifying amendment to Section 14 that was accepted, stated that the section was intended to make corporate officials liable for violations of the Sherman Act "where they have contributed in any degree to the violation, although their act, standing alone, might not be a violation" (51 Cong. Rec. 9681).

under existing law" (51 Cong. Rec. 9678-9679). He stated that Section 14 was "broader than the original law," since "under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation, then he may be convicted as an individual" (51 Cong. Rec. 16320). He also emphasized that

* * we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have, on the contrary, supplemented the penal provisions of the Sherman law and of other existing antitrust laws. [51 Cong. Rec. 16317.]

In response to the question, asked when the conference report was under consideration, whether "the criminal clauses of the Sherman law are still in force and that this act simply supplements them?", Representative Floyd replied: "Certainly; that is correct." He was then asked: "And that those criminal clauses are not repealed?" His answer was: "They are not repealed in any sense, and I thank the gentleman for asking the question." 51 Cong. Rec. 16319.

While there was substantial opposition in Congress to Section 14, both the opponents and the proponents of this provision recognized that corporate officials were already liable under Section 1 of the Sherman Act.' Indeed, the primary ground of opposition was that, since corporate officers were so liable, the proposed broadening of the criminal prohibitions in Section 14 was unnecessary and might even narrow the existing criminal penalties on corporate officials because it was narrower than the aiding and abetting statute. 51 Cong. Rec. 16275.

There are statements in the legislative history, mainly by opponents of Section 14, which indicate a contrary view. But, viewed as a whole, the clear weight of the legislative history supports the conclusion that Section 14 of the Clayton Act was intended by its sponsors to extend the criminal penalties of the Sherman Act to acts by corporate officers, directors or agents which previously had not subjected them to liability under the Sherman Act. Both the legislative history, and the basic purpose of Con-

⁴ Members of the House Judiciary Committee were specifically informed of the adequacy of the Sherman Act to prosecute corporate officials who conspired on behalf of their corporations. A detailed discussion of the MacAndrews case was given by a former Special Assistant to the Attorney General at the hearings. Hearings before the House Committee on the Judiciary, 63rd Cong., 2d Sess., Serial 7, Part 6, pp. 270-272 (1914).

⁵ We find nothing to the contrary in the statements in the House and Senate Reports on the Clayton Act (which otherwise do little more than set out the proposed language of the section) that "whenever" corporate officers are deemed guilty of a misdemeanor under the section they "shall be punished as prescribed in the section." See H. Rep. No. 627, 63rd Cong., 2d Sess., p. 20; S. Rep. No. 698, 63rd Cong., 2d Sess., p. 17. This statement does not indicate that Section 14 was intended to be the exclusive remedy for punishing corporate officials, regardless of the nature of their offense.

gress in enacting the Clayton Act to close the loopholes in the Sherman Act, refute the holding below that Section 14 was intended to be a complete substitute for, rather than merely a supplement to, the criminal penalties imposed by the Sherman Act upon corporate officials. In any event, a far stronger showing in the legislative history of a congressional intent to exclude corporate officials from the criminal penalties of Section 1 would be necessary before the unqualified application of that section to "[e]very person" should be qualified, as the court below interpreted it, to read "[e]very person, other than a corporate official acting in his corporate capacity." Cf. United States v. Dotterweich, 320 U.S. 277.

3. Following the adoption of the Clayton Act, the government continued, as before, to indict under the Sherman Act corporate officers who, in their corporate capacities, had violated that act. During the 47 years between the passage of the Clayton Act and the present case, there was only one indictment which charged a corporate official under Section 14 of the Clayton Act. Moreover, although there were dozens of indictments filed against corporate officers during that period, there were only three cases in which any

^a See e.g., United States v. S. H. Cowell, Cr. C 7308-22 (D. Ore.) (indictment returned October 27, 1916 charging price-fixing conspiracy by officers and agents of cement companies); United States v. Walker G. St. Clair, Cr. 32,953 (Sup. Ct. D.C.) (indictment returned July 6, 1917 charging agents of baking companies of price fixing in violation of Section 1 of the Sherman Act).

⁷ United States v. Potts, Criminal 56-157-M (D. Mass.) (indictment filed June 28, 1956).

question was raised as to the effect of Section 14, and in all three the propriety of the Sherman Act charge was sustained. United States v. National Malleable & Steel Castings Co., 6 F. 2d 40 (N.D. Ohio), and related cases; United States v. General Motors Corp., 26 F. Supp. 353 (N.D. Ind.); United States v. Atlantic Commission Co., 45 F. Supp. 187 (E.D. N.C.).

In the National Malleable case, supra, the indictment charged 52 corporations and 49 officers of those corporations with violating Section 1 of the Sherman Act. The court, concluding that the individuals were charged as "officers having the active management, direction, and control of the interstate trade and business of the corporate defendants engaged in the illegal combination or conspiracy," held that, while a crime was also charged under Section 14 of the Clayton Act, "[i]f the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of section 1 of the Sherman Act" (6 F. 2d at 41). In both the General Motors and the Atlantic Commission cases, supra, the indictment charged, in a single count, corporate officers acting solely in their representative capacities and their corporations with violation of the Sherman Act. In each case, the court upheld the indictment against the claim that it was duplicitous because conduct amounting to a violation of Section 14 of the Clayton Act had been improperly charged in the same count

^{*} See United States ex rel. McGrath v. Mathues, 6 F. 2d 149, 153 (E.D. Pa.); Fitzgerald v. United States, 6 F. 2d 156 (C.A. 1); Meehan v. United States, 11 F. 2d 847, 850 (C.A. 6); cf. United States v. Moore, 7 F. 2d 734 (E.D. Ill.).

as a violation of the Sherman Act. While it may be true, as the court below stated (infra, p. 21), that those cases "have recognized the applicability [of Section 14] where individual defendants as officers having active management, direction and control of the corporation, have been indicted," the significant fact is that in all three cases the propriety of the indictment of the corporate officers under the Sherman Act was sustained." These cases, and the government's long settled and well established practice of indicting corporate officials for antitrust violations under the Sherman Act, both before and after passage of the Clayton Act, are persuasive evidence that Section 14 of the Clayton Act was not intended to be the sole penal provision governing such violations.

4. Further, support for the view that corporate officials are subject to prosecution under Section 1

In Hartford-Empire Co. v. United States, 323 U.S. 386, the provisions of an antitrust decree ran not only against the corporate defendants who were found to have violated the law, but also against "various individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants" (p. 433). This Court, although holding that these individuals "offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant," concluded that "[t]here is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants * * *" (pp. 433-434, emphasis added). The Court then added (pp. 434-435, footnotes omitted): "That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal." But this brief reference to criminal liability under Section 14 of the Clayton Act contains no intimation that the officials might not also be prosecuted under the Sherman Act.

of the Sherman Act is found in the action of Congress in 1955 in raising the maximum fine for violations of the Sherman Act from \$5,000 to \$50,000, while making no change in the \$5,000 maximum fine under Section 14 of the Clayton Act. 69 Stat. 282. The lack of any change in the penalty under Section 14 was not an oversight. Bills introduced in earlier Congresses to increase antitrust penalties had proposed the same increase in the maximum fine under Section 14 as were proposed under the Sherman Act (see H.R. 7035 and S. 2719, 76th Cong., 1st Sess.; H.R. 6679, 81st Cong., 2d Sess.). At the hearings on one of those bills, however, a representative of the Department of Justice testified that the Department was "not urging the enactment" of increased fines for violation of Section 14, since it was primarily concerned with increasing the penalties for violations of the Sherman Act (see Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary. 81st Cong., 2d Sess., Serial 14, Part 3, pp. 4-5; see also, id., p. 15; 96 Cong. Rec. 8071).

The increase in the penalties under the Sherman Act, but not under Section 14 of the Clayton Act, is fully consistent with our view that the latter section was merely intended to reach conduct by corporate officers, directors or agents which, although not previously punishable as a violation of the Sherman Act, nevertheless indicated sufficient culpability to warrant punishment. It seems highly unlikely that, if corporate officers were to be punishable solely under Section 14, Congress would not have increased

the maximum fine thereunder to \$50,000 at the same time that it increased the fine under the Sherman Act.

5. The contention that Section 14 of the Clayton Act provides the exclusive method for criminal prosecution of corporate officers under the antitrust laws has been raised in three other pending cases; in one of them, the indictment was recently dismissed as to the individual defendants. The same contention will undoubtedly be made in all pending criminal cases under the Sherman Act in which corporate officials are defendants. Prompt resolution of the issue by this Court is therefore important.

¹⁰ United States v. A. P. Woodson Company, Criminal No. 375-61 (D.D.C.); United States v. American Natural Gas Co., Criminal No. 59 Cr. 145 (N.D. Ill.); United States v. Milk Distributors Association, Inc., Criminal No. 25658 (D. Md.). In the Woodson case the district court dismissed the indictment as to the individual defendants on September 21, 1961.

¹¹ The government could, of course, file superseding indictments, or informations, in cases where the indictment is dismissed as to the individual defendants and such a proceeding would not be barred by the statute of limitations. Such procedure would have at least three undesirable features. First, it would entail additional—and unnecessary—work. Second, it might introduce complexities at the trial. Third—and most serious—it would permit a maximum fine of only \$5,000.

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted.

Archibald Cox,
Solicitor General.
Lee Loevinger,
Assistant Attorney General.
Richard A. Solomon,
Michael I. Miller,
Attorneys.

Остовек 1961.

APPENDIX A

In the United States District Court for the Western District of Missouri, Western Division

UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE, DEFENDANTS

No. 20542

[Entered by Judge R. Jasper Smith on June 14, 1961]

MEMORANDUM AND ORDER

Several motions filed by defendants are pending for ruling.

T

Defendant Wise has renewed his motion to dismiss Counts 11 and 12 (Section 1, Sherman Act Counts) of the indictment. This motion was submitted earlier and was overruled on March 6, 1961. Leave was given at that time to refile the motion after the Government had filed its bill of particulars.

In the motion defendant contends that he cannot be properly indicted under Section 1 of the Sherman Act, Section 1, Title 15, U.S.C.A., for acts done on behalf of and as a representative of his corporate employer National Dairy Products Corporation, when the acts are alleged to constitute a violation of Section 1 by the corporation. Defendant contends that in such circumstances, he must be indicted under Section 14 of the Clayton Act, Section 24, Title 18, U.S.C.A.

The motion tenders a complicated question as to eriminal liability and responsibility of a corporate officer under the statutory framework of the antitrust laws. Under cases cited by the parties, it is apparent that much doubt and uncertainty existed prior to the enactment of Section 14 of the Clayton Act. See, for example, United States v. McAndrews & Forbes Co., 149 F. 823 (S.D. N.Y. 1906); Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir. 1909); United States v. Swift, 188 F. 92 N.D. Ill. 1911); Nash v. United States, 229 U.S. 373 (1913).

Since enactment of Section 14, several cases have involved that section, but in none of them have the courts been faced squarely with the issues presented here, namely, whether the Sherman Act or Section 14 of the Clayton Act governs the prosecution of a corporate officer, charged under the anti-trust laws solely because he authorized, ordered or did acts constituting a corporate violation. A number of cases since 1914, the date of enactment of Section 14 of the Clayton Act, have recognized the applicability of that statute where individual defendants as officers having active management, direction and control of the corporation, have been indicted. See United States v. Atlantic Commission Company, 45 F. Supp. 187 (E.D. N.C. 1942): United States v. General Motors Corporation, 26 F. Supp. 353 (N.D. Ind. 1939). See also Hartford Empire Company v. United States, 323 U.S. 386 (1945). In those cases the problem was not, as here, highlighted by the fact that in 1955, Congress raised the fine provided by Section 1 of the Sherman Act while not disturbing the fine provided by Section 14 of the Clayton Act.

Here we have a situation where the principal and an employee are both charged with violation of Section 1 of the Sherman Act. Nothing in the indictment specifically alleged that defendant Wise was acting in an individual capacity, and the broad inference of the indictment was that he acted solely within the scope of Section 14 of the Clayton Act. In that posture a bill of particulars was ordered, and in the bill it was stated that, "* * * the defendant Wise, in actively and directly engaging in the alleged offenses, is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by National Dairy Products Corporation of which he was an officer, director, or agent."

While it is undoubtedly true that a bill of particulars does not occupy the status of an amendment to an indictment, it may be considered in determining ambiguous language; and under those circumstances it seems perfectly clear that the sole issue presented now is whether or not an individual, charged solely in his representative capacity and not in any degree on an individual basis for his own personal account, may be charged with a violation of Section 1 of the Sherman Act.

It is my view that he cannot. There can be no question but that confusion and uncertainty existed prior to 1914 when Section 14 was enacted. Equally, there can be no question but that Congress in enacting Section 14, the "personal guilt" provision, intended to eliminate that uncertainty and confusion. It is clear that since 1914 it constituted no problem until the amendment to the punishment section for Section 1; and the fact that no challenge has been made of the question during that time is of little significance. Under clear Congressional interpretations, the Sherman Act governs the prosecution and

punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation. This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force.

The motion of defendant Wise to dismiss Counts 11 and 12 as to him is sustained. Counsel for the Government will prepare appropriate order of dismissal within fifteen (15) days.

H

In view of the ruling on the motion to dismiss, the alternative motion of defendant Wise for severance and separate trial of Counts 11 and 12 is overruled. For the same reason, the alternative motion of defendant Wise joining in certain additional motions of defendant National is overruled.

III

Defendant National has moved for an order directing compliance with the Court's order of March 17, 1961, requiring particulars. As it relates to the particulars set forth in Part II, 1(b) and 3(d), the motion is overruled. As it relates to Part II, 2 and 3(a), it is my view that the Government has not complied with the order of March 17, 1961, requiring particulars, and the motion is therefore sustained, and the Government is directed to file supplemental particulars within thirty (30) days.

As it relates to Part III, 3(b), the Government has conceded that through inadvertence a portion of the material required was omitted. To the extent of the omitted portion, the motion is therefore sustained as to this part, but as to all other portions of 3(b) of Part III, the motion is overruled.

IV

Defendant National has moved for entry of a pretrial order with a proposed form of order. This motion is premature and is overruled. At an appropriate time this case will be scheduled for a pre-trial conference and at that time an order will be formulated controlling the issues and the manner of presentation of each party's case.

V

Defendant National has moved for an order directing issuance of subpoena duces tecum to certain third parties to be returnable in advance of trial. These motions are sustained and the Clerk is directed at such time as is requested by defendant to issue the subpoenas duces tecum to the parties named in the motion and supplemental motion filed by defendant, to be returnable fifteen (15) days in advance of trial in accordance with the motions.

VI

Defendant National has moved, purportedly under Rule 17(c), for the production of certain documents not obtained by the Government by process but which were presented to the grand jury on which are to be offered in evidence upon the trial.

This motion is everruled. Undoubtedly this goes beyond the scope of permissible discovery in criminal eases. Under certain sharply restricted circumstances, in the interests of justice, it is sometimes necessary to disclose evidence that has been presented to a grand jury but no good cause is shown here.

IT IS SO ORDERED.

s/ R. JASPER SMITH. District Judge.

KANSAS CITY, MISSOURI, June 14, 1961.

Attest: A true copy,

J. C. TRUMAN, Clerk. By s/ D. D. DANIEL, Jr., Deputy.

APPENDIX B

In the United States District Court for the Western District of Missouri Western Division UNITED STATES OF AMERICA, PLAINTIFF

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE, DEFENDANTS

Criminal Action No. 20542

[Entered August 10, 1961]

ORDER DISMISSING COUNTS ELEVEN AND TWELVE AS TO THE DEFENDANT RAYMOND J. WISE

Upon the renewed motion of the defendant RAY-MOND J. WISE to dismiss Counts Eleven and Twelve of the indictment as to him, and the Court having considered such motion, together with briefs filed in support thereof and in opposition thereto, and having considered the indictment and bills of particulars filed by the United States of America,

and the Court being fully advised in the premises, FINDS AND HOLDS:

That the defendant Wise is alleged to have been acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed by defendant National Dairy Products Corporation of which he was an officer, director, or agent; that accordingly he cannot be charged on the basis of such acts with a violation of Section 1 of the Sherman Act, and since the Government charges him and represents that it intends to charge him only under Section 1 of the Sherman Act in Counts Eleven and Twelve of the indictment, his renewed motion to dismiss said counts should be and hereby is sustained.

IT IS THEREFORE ORDERED that Counts Eleven and Twelve of the above entitled indictment be and they hereby are dismissed as to the individual defendant RAYMOND J. WISE

ENTER.

8/ R. JASPER SMITH, United States District Judge.

Dated: Aug 10 1961.

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IN THE -

Supreme Court of the United States

OCTOBER TERM, 1961

No 488

UNITED STATES OF AMERICA. Appellant

RAYMOND J. WISE. Appeller

On Appeal From The United States District Court For The Western District of Misseuri

MOTION TO AFFIRM

JOHN T. CHAPWELL RICHARD W. McLAREN JAMES A. RAHL JAMES E. HASTINGS 135 South LaSalle Street Chicago 3, Illinois

Of Counsel.

SNYDER, CHADWELL, KECK. KAYSER & RUGGLES

> Martin J. Purcell 1701 Bryant Building Kansas City 6, Missouri

Of Counsel:

MORRISON, HECKER, BUCK & COZAD

> JOHN H. LASHLY 705 Olive Street St. Louis 1, Missouri

Of Counsel:

LASHLY, LASHLY & MILLER

Attorneys for Appellee

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51 Cong. Rec. 14324
or cong. rec. 17327

Supreme Court of the United States

OCTOBER TERM, 1961

No. 488

UNITED STATES OF AMERICA, Appellant

V.

RAYMOND J. WISE, Appellee

On Appeal From The United States District Court For The Western District of Missouri

MOTION TO AFFIRM

The appellee, Raymond J. Wise, moves that the judgment of the district court, dismissing as to him counts 11 and 12 of the indictment, be affirmed pursuant to Paragraph 1(c) of Rule 16 of the Revised Rules of this Court.

Statement

The district court dismissed as to the appellee two counts of a 15-count antitrust indictment, holding that conduct by an individual acting for a corporation in a representative capacity is not subject to the criminal penalties of the Sherman Antitrust Act. (26 Stat. 209, 15 U.S.C. § 1) The opinion of the district court is reported at 196 F. Supp. 155.

The court acted only after the Government had conceded in a bill of particulars that the appellee had been indicted solely for things allegedly done in his capacity as an officer of the defendant National Dairy Products Corporation. (J.S. 4)¹ It held that such conduct is completely covered by the criminal provisions of Section 14 of the Clayton Act. (J.S. App. A 20-23) The Government having disavowed any reliance upon Section 14, however, the court stated that dismissal under these counts was the only appropriate course.² (J.S. App. A 26)

The Government's grounds for appeal present no substantial or important question for review. No gap in the coverage of the criminal sanctions of the antitrust laws as a whole has been created by the district court decision, for Section 14 of the Clayton Act is fully available to cover charges of the

¹ The abbreviation, "J.S.", is used herein for citation to the Jurisdictional Statement filed by the Government. The abbreviation, "J. S. App.," refers to the Appendix to the Jurisdictional Statement, which contains the opinion and order of the district court in this case. The opinion of the district court is reported at 196 F. Supp. 155.

² The appellee was also indicted in one count and his employer, National Dairy Products Corporation, was indicted in seven counts for alleged violation of Section 3 of the Robinson-Patman Act. The district court dismissed these counts on the ground that Section 3 is unconstitutional. This dismissal is the subject of a separate appeal by the Government in No. 173, this Term. No dismissal has been ordered of other counts charging National Dairy Products Corporation with violation of the Sherman Act, and the case is still pending on these counts in the district court.

type dismissed. The Government asserts further that it can reinstate the charges against this appellee simply by filing another indictment or information. (J.S. 18, note 11) No conflict in statutory interpretation exists among lower federal courts. Three different district courts, the only courts to rule upon the question, have recently held the Sherman Act inapplicable to corporate officials acting in their representative capacity.

The Jurisdictional Statement attempts to overturn these decisions by an extended argument of legislative intent based largely upon the remarks of one Congressman on the House floor in the debates on Section 14 in 1914, and upon an unwarranted interpretation of a few earlier cases on other points. The following argument includes a brief presentation of legislative and case material to make it clear that the district courts' decisions rest upon a firm historical, as well as legal, foundation. But it is appellee's primary position, set forth under point 1 of the Argument, that the meaning of the language of the statutory provisions involved is so clear as to warrant summary affirmance and to make resort to legislative history and extended argument unnecessary.

Argument

1. The charges made against appellee clearly are governed by the express terms of Section 14 of the Clayton Act, and do not come within the terms of the Sherman Act. Accordingly, the district court's decision may be affirmed on the basis of the plain meaning of the statutes involved. The indictment charged that appellee had "authorized or ordered to be done some or all of the acts alleged . . . to have been done by National." (Counts 11 and 12, Par. 75 and 83) In its bill of particulars, the Government made it clear that while appellee was "personally" charged with participation in the alleged illegal acts of his employer, he was at the time "acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts constituting in whole or in part the violations alleged also to have been committed" by the corporation. (J.S. 4)

The charges are thus a virtual copy of the language of Section 14 of the Clayton Act. Furthermore, not only does Section 14 cover the alleged conduct, but in plain language the section provides that when conduct of this kind occurs it is to be punished as prescribed in that section. No authority is granted for proceedings under the Sherman Act. Section 14 states:

"Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." (38 Stat. 736, 15 U.S.C. § 24; emphasis supplied)

In contrast, the Sherman Act contains no provision governing the criminal responsibility of persons who act on behalf of corporate defendants. Section 1, the substantive section relied upon by the Government, merely provides that every "person" who shall "make" an illegal contract or "engage in" any illegal combination or conspiracy shall be punished as described. When in Section 8, the Sherman Act gives its only definition of "person," it omits any reference to persons acting for a corporation in a representative capacity. Congress simply did not cover such corporate representatives in the Sherman Act.

5

It is the corporate principal, and not its employee, which "makes" contracts or "engages in" combinations of the kind referred to in Section 1. An agent or representative who merely acts for a disclosed corporate principal as to a contract sobviously not a party to the contract, and in legal contemplation is not one who "makes" the contract. For the same reason, one who represents a corporation in a combination or conspiracy does not thereby "engage" in the

conspiracy in a legal sense. To hold that he does would encounter the additional objection of being contrary to the general rule that a corporate employee is legally incapable of conspiring with his own corporation where he acts within the scope of his employment. Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911, 914 (5th Cir. 1952); Goldlawr, Inc. v. Shubert, 276 F. 2d 614, 617 (3d Cir. 1960); Marion County Co-op. Ass'n. v. Carnation Co., 114 F. Supp. 58, 62 (W.D. Ark. 1953). This rule was recognized before the passage of Section 14, Union Pacific Coal Co. v. United States, 173 Fed. 737, 745 (8th Cir. 1909).

That Congress understood that the Sherman Act does not reach corporate representatives is clearly shown by a report of the Judiciary Committee of the House of Representatives in 1900, 10 years after passage of the Sherman Act. The committee stated:

"Section 8 of the present law [Sherman Act] did not include in the definition of 'person' or 'persons' the agents, officers, and attorneys of the corporations and associations referred to, and their action as such agents, officers, and attorneys did not subject them to any penalties under the law" (H. Rep. No. 1506, 56th Cong., 1st Sess., May 16, 1900, 2)

Although a bill to amend the Sherman Act to cover corporate agents was reported by the Judiciary Committee in 1900 and was passed by the House, it failed to pass the

Senate. (33 Cong. Rec. 6502) Again in 1914, before it passed the Clayton Act, Congress had before it a proposal to subject corporate representatives to criminal liability under the Sherman Act by providing that anyone who "shall aid or abet" an antitrust violation shall be himself guilty of that violation and punishable accordingly.³ This proposal failed and Congress chose instead the separate treatment of corporate officials provided in Section 14 of the Clayton Act.

This decision by Congress, expressed in plain language, requires the prosecution of cases such as the present one under Section 14, and not under the Sherman Act. As the lower court said:

"This interpretation is supported by the wording and legislative history of Section 14, and is in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force." (J.S. App. A 23; 196 F. Supp. at 157)

The last-quoted sentence is of particular significance. The theory for which appellant contends would leave no room for operation of Section 14, and under well-established rules is a construction to be avoided.

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³ The proposal was submitted by Representative Volstead, 51 Cong. Rec. 9609, 9676, and after full deliberation was specifically rejected by the House, 51 Cong. Rec. 9678, following which Section 14 was adopted the same day, *id.* at 9682. (63rd Cong. 2d Sess., 1914)

This Court in direct reliance upon the statutory language has recognized explicitly that the appropriate statutory basis for prosecution of cases such as the present one is Section 14 of the Clayton Act. In *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945), a civil case under the Sherman Act, certain individual defendants were found to have "offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant." The Court held it unnecessary to include these individuals in the injunction because they had acted only in a representative capacity and were not shown to have had any personal interest in the subject-matter of the violations. With regard to criminal responsibility, however, the Court stated:

"That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal." (323 U.S. at 434-5)

2. The three district courts which have passed upon the issue in this case have agreed that the Sherman Act does not apply to the conduct charged, and that the controlling provision is Section 14 of the Clayton Act. In the present case, the District Court, by Judge Smith, held:

"Under clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own behalf, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation." (J.S. App. A 22-23; 196 F. Supp. at 157)

The District Court for the District of Columbia has reached the same conclusion. In *United States* v. A. P. Woodson Co. (Crim. No. 375-61, D. D.C., Sept. 21, 1961), CCH, 1961 Trade Cases ¶ 70,112, the court ordered dismissal of Sherman Act charges against certain corporate officials who were charged solely in a representative capacity. Judge McLaughlin endorsed the opinion of Judge Smith in the instant case, and stated:

"... [T]he Court is of the opinion that the legislative history of the Sherman Act clearly reveals that Congress intended it to apply exclusively to corporate trusts and individuals acting in their individual capacities. The Court is also of the opinion that Section 14 of the Clayton Act was intended to be the exclusive remedy against corporate officials acting in their corporate capacities and not, as contended by the Government, a mere supplement to an existing remedy under the Sherman Act." (CCH, 1961 Trade Cases at p. 75,377)

Also, the District Court for the Eastern District of Wisconsin has recently made the same holding in *United States* v. *American Optical Co.* (Crim. No. 61-CR-82, Nov. 3, 1961), (unreported), reprinted in the Appendix attached to this motion. Ordering dismissal of a Sherman Act indictment as to two corporate officials, Judge Tehan in an oral opinion stated:

"It is our conclusion that Sections 1 and 2 of the Sherman Act were intended to govern prosecution of

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corporations and individuals acting in their own behalf, and that officers of corporations charged with performing acts in their representative capacities, even though charged "personally," cannot be prosecuted under those sections, but must be prosecuted under Section 14 of the Clayton Act." (Appendix, infra App. 5)

As the above courts held, there have been no contrary decisions which have ruled directly on the question presented since the enactment of Section 14. In its Jurisdictional Statement (J.S. 15), the Government states that three district court cases since passage of Section 14 in effect have sustained the propriety of Sherman Act charges against corporate officers despite having Section 14 called to their attention, viz., United States v. National Malleable & Steel Castings Co., 6 F. 2d 40 (N.D. Ohio 1924); United States, v. General Motors Corp., 26 F. Supp. 353 (N.D. Ind. 1939); and United States v. Atlantic Commission Co., 45 F. Supp. 187 (E.D. N.C. 1942). It is clear, however, that none of these decisions involved the issue in this case, and none constituted a holding that the Sherman Act applies to conduct of corporate officials which is solely representative.

In the National Malleable case, the district court avoided ruling on the question, referred to both statutes and did not specify upon which it sustained the indictment. It is noteworthy that in a case growing out of the same indictment, the Court of Appeals for the Sixth Circuit, in Meehan v. United States, 11 F. 2d 847, 850 (1926), interpreted the

The same interpretation of the same indictment was also made by a district court in *United States* v. *Mathues*, 6 F. 2d 149, 153 (E.D. Penn. 1925).

In the General Motors Corp. case the court was ruling on a claim that the indictment was duplicitous, and it said that the indictment of the corporate officers there involved was properly based on the Sherman Act because it did not mean "that their conduct as such officers is complained of, but rather they are charged as individuals." The court thus rested on the clear distinction between individuals who act on their own behalf, and who are then subject to the Sherman Act, and those who act in a representative capacity. (26 F. Supp. at 355) And in the Atlantic Commission case, the court rejected a duplicity objection for similar reasons, relying for authority upon the General Motors case (See 45 F. Supp. at 195), and thus evidently resting on the same distinction.

Inconsistently, the Government attempts to make a virtue of the very lack of modern decisions to support its position. It points out that there have been "dozens of indictments" of corporate officials under the Sherman Act over the years without regard to the existence of Section 14; it has indicted under Section 14 only once; no question was raised before in any way except in the three cited cases; and only now is it encountering opposition on this point. (J.S. 14-15) All

that is signified by this lack of prior attention to the issue is that the distinction between the two substantive offenses has been obscured by the Government's established practice of ignoring Section 14, and by the fact that the penalty for violation of the two sections was the same until 1955, when the maximum fine under the Sherman Act was raised to \$50,000 while the fine under Section 14 was left at \$5,000. Now that the issue is finally raised and brought into sharp focus, the Government should be permitted to gain nothing from the fact that the issue has been overlooked by both it and earlier defendants. As the court below said, this "is of little significance." (J.S. App. A 22; 196 F. Supp. at 157)

The only other cases urged by the Government in support of its position are five district court decisions all of which were very early in Sherman Act history. (J.S. 7-9) Whatever may be claimed as to the holdings in these cases, they have no force today because all were decided before Congress took the matter in hand for the first time and directly legislated upon it. But in any event, none of them holds that corporate officials acting solely in a representative capacity are indictable under the Sherman Act. All that can be derived with certainty from these cases is that persons who were also corporate officials could be indicted under the Sherman Act where they had utilized the corporate form as a cover to further their own personal interests.

In three of the cases, the corporations were not even indicted: United States v. Winslow, 195 Fed. 578 (D. Mass.

1912); United States v. Swift, 188 Fed. 92 (N.D. Ill. 1911); and United States v. Patterson, 201 Fed. 697 (S.D. Ohio 1912). In one, United States v. New Departure Manufacturing Co., 204 Fed. 107 (W.D. N.Y. 1913), no issue pertinent to this problem was raised. In the fifth, United States v. MacAndrews & Forbes Co., 149 Fed. 823 (S.D. N.Y. 1906), the corporation was convicted and the officers were acquitted, a result completely inconsistent with the Government's contention. (CCH, Federal Antitrust Laws, Summary of Cases, 1890-1951, Case No. 34) Further, this case and the Winslow and Swift cases have been construed in the past by the Government itself as charging the individuals with action on their own behalf and not merely in a representative capacity. This construction was adopted when the Government was much closer in time to these cases than it now is, and saw them as we do now, and not as it does now. In the appeal to this Court in the Winslow case in 1913, the Solicitor General's argument is summarized in the official report as including the following statement:

"Individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action. United States v. Swift, 188 Fed. Rep. 92, 98; United States v. McAndrews & Forbes Co., 149 Fed. Rep. 823. . . ." (United States v. Winslow, 227 U.S. 202, 204)

Thus, there is no controlling case support for the Government's present position, either before or since 1914. Instead,

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the cases have recognized over and over, and with past support from the Government itself, the distinction expressly adopted in the instant case by the lower court, between individual action for personal purposes, indictable under the Sherman Act, and individual action in a representative capacity, indictable under the Clayton Act.

The legislative history of Section 14 of the Clayton Act shows that Congress did not consider corporate representatives to be covered by the Sherman Act, and that Congress intended to have their liability governed by Section 14. The Government has relied almost completely upon isolated remarks by one Congressman, Mr. Floyd, in floor debate in the House to attempt to show Congressional belief that the problem was already covered by the Sherman Act. (I.S. 10-14) But Congressman Floyd believed that new legislation was badly needed and there would have been little basis for his belief if he shared the Government's present view of the Sherman Act. While some of his statements in debate are ambiguous, his remarks may be interpreted as sharing the view that the Sherman-Act reached acts done by corporate officials acting in their individual capacity, but not acts which were purely in a corporate capacity. Thus, he stated:

"But if the individual independently had violated the Sherman law and was guilty of violation of it in any way as an individual, he could be convicted without ever convicting the corporation. . . . (51 Cong. Rec. 9679; emphasis supplied)

Irrespective of the interpretation of Congressman Floyd's remarks, the Government argument ignores the fact that Congress obviously believed at the very least that there was such a major problem with Sherman Act coverage as to require complete new legislation on the subject. Congress obviously intended to chart the future by taking the whole subject into the comprehensive, specific jurisdiction of Section 14, and there is no legislative history, cited by the Government or otherwise, which establishes any other intention.

The Jurisdictional Statement has ignored the plain language of the statutes, whereas this language is of primary importance in determining the issue. Nevertheless, the legislative history, as evidenced by the Committee Reports of both the House and the Senate fully supports the lower court decision.

The original version of Section 14 appeared as Section 12 in the Clayton Bill. (H.R. 15657, 63rd Cong. 2d Sess. 1914) The report of the House of Representatives Committee on the Judiciary accompanying the bill described the section as follows:

"PERSONAL GUILT.

"Section 12 is the personal guilt provision of the bill: It provides that whenever a corporation shall be guilty of a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation,

and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished as prescribed in the section." (H. Rep. No. 627, 63rd Cong. 2d Sess. (1914) 20; emphasis supplied)

The Senate Judiciary Committee's report on its version of Section 14, which was substantially similar in all material respects to the House version, was even more explicit that the new law would be relied upon to establish and to govern the liability of corporate officials. The Report stated:

"Existing antitrust acts are further supplemented by a provision that whenever a corporation shall violate the antitrust acts such violation shall be regarded as that also of the individual directors and officers of the corporation who shall have authorized, ordered, or committed any of the acts constituting such violation, thus fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law." (S. Rep. No. 698, 63rd Cong. 2d Sess. (1914) 1-2; emphasis supplied)

The following statement of Senator Culberson, Chairman of the Senate Judiciary Committee and spokesman for the Clayton bill in the Senate, should remove any possible doubt as to the intent of Congress:

"What I mean to say is this: Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that Act, the guilt of that corporation would not be visited upon the individual director or agent or officer who authorized or committed or induced the act. This section is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation." (51 Cong. Rec. 14324)

The Government attempts to explain the enactment of Section 14 on the theory that it merely added to an existing Sherman Act coverage of corporate representatives by reaching persons who "had not personally and directly participated in the corporate violations," or whose conduct "was not sufficient to make them parties to the illegal conspiracy." (J.S. 7) This argument offers no explanation for the fact that in Section 14 Congress expressly covered any official who has "authorized, ordered or done any of the acts constituting in whole or in part" the corporate violation. (Emphasis supplied) Thus Congress covered officials who, on behalf of the corporation, do all of the things constituting the corporate violation, thereby legislating on the same activities now claimed by the Government to have been covered already by the Sherman Act. Further, no illustration of the asserted difference is given, and since the Department of Justice has only once in 47 years resorted to Section 14, it appears that the section has not heretofore been thought by the Government to have the broader quality now suggested.

The Jurisdictional Statement attempts to find support in the fact that in 1955 Congress raised the maximum fine for violations of the Sherman Act to \$50,000 but left the maxi-

mum fine for violations of Section 14 at \$5,000. This action of Congress in directly differentiating between the two statutes is completely contrary to the Government's position here. Congress certainly cannot have intended to provide for two radically different criminal penalties for the same conduct, leaving it to the complete discretion of the prosecution to disregard the lower penalty and seek always the higher. Yet the Government argument attributes to Congress this unreasonable intention. And it is the effort to obtain a higher maximum penalty than that expressly provided by Section 14 that, according to the Jurisdictional Statement, provides the principal reason for this appeal. (J.S. 6 and 18, note 11) Even the testimony by a representative of the Department of Justice, which is cited in the Jurisdictional Statement (J.S. 17), contains no express statement of the views now advanced by the Government, and it was given in 1950, five years earlier than the amendment to the Sherman Act. But even if the testimony did contain such an express statement, it would represent nothing more than the argument which has now been rejected by three district courts.

4. The Government makes a brief suggestion that affirmance of the trial court decision would create difficulty in administering the law, but the details of this suggestion are confined to a footnote. (J.S. 18, note 11) The note states that there would be additional work in filing superseding indictments, trial complexities which are totally unspecified, and a lower maximum fine. These reasons do not touch

the merits and certainly furnish no basis for denying the Motion to Affirm. The fact that the Government does not wish to be limited to a maximum penalty of \$5,000 provides no ground against affirmance. Congress has chosen to limit the fine for corporate officials acting in a representative capacity to that amount and its intention controls, not the wishes of the Government.

Conclusion

The appeal presents no substantial legal issue or question of practical importance to antitrust enforcement. The judgment of the trial court should be affirmed summarily.

Respectfully submitted.

JOHN T. CHADWELL
RICHARD W. McLAREN
JAMES A. RAHL
JAMES E. HASTINGS
135 South LaSalle Street
Chicago 3, Illinois

Of Counsel:

SNYDER, CHADWELL, KECK, KAYSER & RUGGLES

MARTIN J. PURCELL 1701 Bryant Building Kansas City 6, Missouri

Of Counsel: Morrison, Hecker, Buck & Cozad

JOHN H. LASHLY 705 Olive Street St. Louis 1, Missouri

Of Counsel:

LASHLY, LASHLY & MILLER

Attorneys for Appellee

November 10, 1961.

APPENDIX

In the United States District Court for the Eastern District of Wisconsin

UNITED STATES OF AMERICA, Plaintiff,

V.

AMERICAN OPTICAL COMPANY, an Association; AMERICAN OPTICAL COMPANY, a Corporation; BAUSCH & LOMB, INCORPORATED; VICTOR D. KNISS; and ALTON K. MARSTERS, Defendants.

No. 61-CR-82

TRANSCRIPT OF PROCEEDINGS UPON ORAL DECISION, NOVEMBER 3, 1961

THE COURT [By Judge Tchan]:

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turned by the grand jury charging the defendants, American Optical Company, an Association, American Optical Company, a corporation, Bausch & Lomb, Incorporated, Victor D. Kniss, executive vice-president of American Optical Company, a corporation, and a trustee of Ameri-

On August 1, 1961, a two count indictment was re-

can Optical Company, an Association, and Alton K. Marsters, vice-president of Bausch & Lomb, with violations of Sections 1 and 2 of the Sherman Act.

The individual defendants have each filed a Motion to Dismiss, both asserting the ground that the indictment complains only of alleged action and conduct performed by them in their representative capacities, and does not therefore set forth any violation of Section 1 or 2 of the Sherman Act.

The moving defendants contend that "Indictments under Sections 1 and 2 of the Sherman Act can not impose criminal responsibility on corporate officials charged only with authorizing, ordering or doing the corporate violations, inasmuch as such conduct is covered by Section 14 of the Clayton Act."

Substantially, the same contention was advanced successfully in the recent cases of *United States* v. National Dairy Products Corp. (W.D. Mo.) and States v. A. P. Woodson Co. (Dist. Col.)

In the National Dairy case, the court held that an individual charged solely in his representative capacity and not in any degree on an individual basis for his own personal account cannot be charged with violating Section 1 of the Sherman Act, stating that the Sherman Act governed prosecutions and punishment of corporations and individuals who, as principals, act in their own behalf, and Section 14 of the Clayton Act covered prosecution and punishment of individuals, who, as corporate officials, took part in corporate violations.

In the Woodson case, a motion of individual defendants, corporate officials, to dismiss an indictment returned against them under Section 3 of the Sherman Act was granted, the court there holding also that since those defendants were charged with doing acts as corporate officials, in their representative capacities, they could not be prosecuted under Section 3 of the Sherman Act, the Government's exclusive remedy against them being under Section 14 of the Clayton Act.

The Government does not attempt to distinguish the case at bar factually from the National Dairy or Woodson cases. An examination of the indictment convinces us, and the Government appears to agree that here, too, the moving defendants are charged only with actions and conduct

performed in their representative capacities. Thus on Page 3 of its brief in opposition to the defendants' Motions to Dismiss, the Government states:

"The indictment shows on its face that they (being the moving defendants) are charged with having conspired with each other while acting as officers of the defendant corporations. The indictment does not charge the guilt of the individuals as being imputed to them from the guilt of the corporation. Instead, it charges each individually and personally is guilty of conspiring in violation of the Sherman Act while functioning as an officer of the defendant corporation."

In this respect, it must be found that this case is identical to both the National Dairy and Woodson cases.

We are in complete agreement with the holdings of the United States District Courts for the Western District of Missouri and the District of Columbia in the National Dairy and Woodson cases, and with their reasoning on their arguments therein advanced, and therefore see no purpose in elaborating on or restating that reasoning. It is our intention to discuss today only the argument which, according to the Government, was made to neither court. This argument relates to the purpose for which the sections here involved were enacted, and results in the rather bizarre conclusion that under Sections 1 and 2 of the Sherman Act, corporate officers who, while acting in their representative capacities, knowingly participated in, performed or authorized acts violative of those sections could be prosecuted therefor, while under Section 14 of the Clavton Act, when a corporation was found to have violated the Sherman Act, any officer, agent, and the like, of that corporation could be prosecuted for performing any act, however innocent, "which entered into and formed a part

of the conviction of the corporation." That is on Page 19 of the Government's brief.

We agree with counsel for the defendants' summation that under this theory, knowingly, illegal and or conspiratorial acts are punishable under the Sherman Act, while Section 14 was enacted to reach and punish innocent actors who, in performing their innocent acts, furthered their corporation's violation. Understandably, we believe, we cannot accept this argument. To state it is to refute it? Neither does it appear that the argument is new. In the Woodson case, 1961 Trade Cases Paragraphs 70,112, the court stated at Page 75,377:

"The Government in its argument raised two points which were not presented in National Dairy. The first concerns the claim that Section 14 was intended to supplement the Sherman Act by 'facilitating the punishment of top echelon corporate officials who did not participate in anti-trust violations to an extent sufficient to be a conspirator under the Sherman Act.' Memorandum in Opposition, pg. 7. The Government contends that the Sherman Act makes no distinction between corporate officials who are acting in their corporate capacities and those acting solely in furtherance of their individual interests. Its argument is to the effect that Section 14 sought to reach those persons whose acts standing alone might be absolutely innocent, but which contributed in whole or part to the violation by the corporation. The distinction the Government appears to be advocating is that the Sherman Act applies to officers acting in their corporate capacities who actually perform acts constituting a violation of the law while Section 14 of the Clayton Act is applicable only to those officers acting in their corporate capacities who, although authorizing and directing such acts, cannot be reached under the Sherman Act because such acts are too remote."



We find no merit to the Government's position that Section 14 of the Clayton Act imputes a corporation's guilt to any officer, and the like, of the corporation performing any act relating to the crime of the corporation.

The Government has also argued that no individual can be charged under Section 14 of the Clayton Act until the guilt of the corporation for which he acted has been established, that is, that both the corporation and its officers could never be charged in the same indictment if Section 14 alone applied to officers acting in their representative capacities. This argument has no bearing on the question of whether the moving defendants herein are properly charged.

It is our conclusion that Sections 1 and 2 of the Sherman Act were intended to govern prosecution of corporations and individuals acting in their own behalf, and that officers of corporations charged with performing acts in their representative capacities, even though charged "personally," cannot be prosecuted under those sections, but must be prosecuted under Section 14 of the Clayton Act.

The motions of the defendants, Victor D. Kniss and Alton K. Marsters, to dismiss the indictment as to them are therefore granted.

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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1961

United States of America, appellant

v.

RAYMOND J. WISE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

ARCHIBALD COX,
Solicitor General,
LEE LOEVINGER,
Assistant Attorney General,
RICHARD A. SOLOMON,
Attorney,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, APPELLANT

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We do not believe that a district court decision overturning the established practice of more than forty-five years of indicting corporate officials, who have individually participated with their companies in conspiracies to violate the Sherman Act, under that Act rather than under Section 14 of the Clayton Act, can properly be characterized as raising questions so unsubstantial as not to require further argument (see Revised Rules of this Court, Rule 16(c)). The issue obviously does not cease to be substantial merely because two other district courts have followed the opinion below. Nor does it lose significance because the government might be able, where the statute

of limitations has not run, to file new indictments or informations charging the individual defendants with violation of Section 14 of the Clayton Act. For the individual defendant is subject to a substantially lesser penalty for violation of Section 14 than for violation of the Sherman Act. In addition, the joinder of a Section 14 charge against the corporate officials with the Sherman Act charge against the corporation would inevitably lead to additional procedural problems and trial complexities. A brief response to some of the substantive points raised in the motion to affirm is, nevertheless, appropriate.

1. A principal argument is that since the language of Section 14 of the Clayton Act ("** * the individual directors, officers, or agents of such corporation who shall have * * * done any of the acts constituting in whole or in part such violation * * * ") is broad enough, in terms, to include any corporate official participating in a violation of the Sherman Act, Section 14 must be held to constitute a pro tanto repeal of the Sherman Act, regardless of the express statements to the contrary made by the sponsors of the new provision (see J.S. 11-13). This argu-

¹ Since there is virtually no previous history of indictments under Section 14 of the Clayton Act, the exact nature of these procedural problems cannot be foretold. But if, as we contend, indictments against responsible corporate officials actively participating in Sherman Act violations by their corporations have been properly brought under that Act, it is desirable to avoid the delays required to litigate the questions which would almost certainly be raised as to the application of the special procedures of Section 14 of the Clayton Act. This consideration underlines the importance of the present case.

ment is at odds with the other principal contention of the appellee that Congress intended to create a dichotomy between "corporate officials acting solely in a representative capacity" (who allegedly would be indictable only under Section 14) and "corporate officials [who] could be indicted under the Sherman Act where they had utilized the corporate form as a cover to further their own personal interests" (motion to affirm, p. 12). For it is clear that the language of Section 14 covers both classes of corporate officials. In any event the argument has no merit.

The Clayton Act in its entirety was intended to implement the Sherman Act by specifically prohibiting various anticompetitive practices, the legality of which under the Sherman Act was either unclear or doubtful. But the fact that particular conduct violates the more specific prohibitions of the Clayton Act does not establish that it does not also violate the Sherman Act. For example, conduct that violates Section 3 of the Clayton Act may also violate the Sherman Act (see Standard Oil Co. v. United States, 337 U.S. 293; cf., Times-Picayune v. United States, 345 U.S. 594, 608-10); and an acquisition that violates Section 7 of the Clayton Act may also violate Section 1 of the Sherman Act (see United States v. du Pont & Co., 353 U.S. 586; ef., United States v. Columbia Steel Co., 334 U.S. 495). This overlapping of statutory remedies is by no means unique. As this Court stated in Times-Picayune, supra, at p. 609, a tying arrangement which is banned by either Section 3 of the Clayton Act or Section 1 of the Sherman Act also "transgresses § 5 of the Federal

Trade Commission Act, since minimally that section registers violations of the Clayton and Sherman Acts. Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 395 (1953); Federal Trade Commission v. Cement Institute, 333 U.S. 683, 690-694 (1948); Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 463 (1941)." Thus, the fact that Section 14 of the Clayton Act was broadly drafted in an effort to insure against any gap in the liability of corporate officials does not restrict the government to indicting corporate officials under that provision where their acts also violate the Sherman Act.

There is no merit to appellee's contention (motion to affirm, p. 7) that its interpretation of Section 14 must be accepted, since otherwise that section may not have any independent meaning. For whether or not that section today reaches any conduct by corporate officials that does not also violate the Sherman Act, Congress believed that it was extending the thenexisting scope of the Sherman Act when it enacted Section 14 in 1914. It also indicated that it did not intend to repeal the existing prohibitions of Section 1 of the Sherman Act-prohibitions which, at that time, had already been held to cover corporate officials acting in their corporate capacity (see below.) It was argued in 1914 that, particularly in view of the provisions of the existing aiding and abetting statute (then Section 332 of the Criminal Code, 35 Stat. 1152 (1909), now 18 U.S.C. 2(a)), the enactment of Section 14 might not significantly extend the existing liability of corporate officials. See, e.g., 51 Cong.

Rec. 16283. And, in the light of developments in the law of conspiracy since 1914, there may be relatively few circumstances where a corporate official could be convicted under Section 14 because of his participation in a conspiracy in restraint of trade in which his corporation was involved, but could not also be convicted as a conspirator under Section 1 of the Sherman Act. It is this circumstance, rather than the fact that up to 1955 both sections had the same penalty, which accounts for the almost universal practice of indicting individual defendants under the Sherman Act, rather than under Section 14 of the Clayton Act.

2. As we pointed out in the jurisdictional statement (pp. 7-10), it was established prior to 1914 that corporate officials, including those who could not conceivably be classified as utilizing the corporations as a front for their own personal activities, could be prosecuted under the Sherman Act where they had individually participated as conspirators. See, e.g., United States v. MacAndrews & Forbes Co., 149 Fed. 823, 832 (S.D. N.Y.); United States v. Patterson, 201 Fed. 697 (S.D. Ohio), affirmed, 222 Fed. 599 (C.A. 6). This conclusion is not negatived by the fact that a Congressional Committee in 1900, at a time when the Sherman Act was virtually moribund and there had been little history of its application to individuals, recommended an amendment to make the definition of "person" in the Sherman Act expressly include "agents, officers, and attorneys" of corporations. The government in its appeal to this Court in United States v. Winslow, 227 U.S. 202, did not adopt appellee's position, or its interpretation of

the MacAndrews & Forbes case as limited to situations where the officials were using a dummy corporation for their personal purposes. As detailed in the jurisdictional statement (p. 9), the district court in the Winslow case rejected a demurrer based upon the claim that individuals who "are only officers or directors" of a corporation cannot violate the Sherman Act (195 Fed. 578, 581). However, in the government's appeal to this Court from the district court's dismissal of the indictment, an issue was presented whether the indictment charged the individual defendants with sufficient personal participation in the alleged violations to make them principals. It was in this context that language similar to that cited in the motion to affirm (p. 13) was used in the government's brief.2 But an examination of the cases cited by the government (and listed at 227 U.S. 204) makes clear that all that was being argued in Winslow was that, where the individuals indicted are the controlling managers of the corporations or otherwise responsible for the illegal acts, they, as well as the

² The statement in the government's brief (No. 620, Oct. Term, 1912, p. 12) actually read:

It is well settled that individuals are criminally liable and subject to indictment for acts done in corporate form where the individuals themselves personally do or procure to be done such things; and it is no objection to the indictment that it alleges that the defendants did the acts complained of in the name of and through the instrumentality of a corporation. (Rec., p. 76 [the portion of the lower court decision (195 Fed. at 581) holding that corporate directors "acting an immediate, special part in the proceedings" are liable as principals]; U.S. v. Swift, 188 F.R. 92, 98; * * *.)

corporation, can be held criminally liable. The government did not suggest that corporate officials who were not controlling managers, but who had directly participated in the conspiracy, could not be prosecuted under the Sherman Act.

3. Appellee argues (motion to affirm, pp. 10-11) that the judicial history of Section 14 of the Clayton Act prior to the instant case supports its distinction between corporate officials acting on their own behalf and those acting in a representative capacity. The fallacy of this argument with respect to the officials involved in *United States* v. General Motors Corp., 26 F. Supp. 353, 355 (N.D. Ind.), is readily apparent. Those officials were not charged, and in view of the nature of General Motors could not have been charged, with acting in anything other than their representative capacity—except in the sense that all corporate officials charged with individual participation in a conspiracy to violate the Sherman Act are acting for themselves as indirect beneficiaries of the

Thus, in People v. Clark, 8 N.Y. Cr. Rep. 179, 194-5, 212, it was held that the president and directors of the New York, New Haven & Hartford Railroad could be criminally indicted for violating the Car Stove Heating Act if they were charged with doing the illegal acts or counseling, aiding or abetting the railroad to violate the law. In People v. Duke, 44 N.Y. Supp. 336, 337-39, an indictment charging 9 officers and agents of the American Tobacco Co. with a common law conspiracy to monopolize and restrain trade in the manufacture and sale of cigarettes was upheld. See also People v. White Lead Works, 82 Mich. 471, 479 (officers of paint manufacturer); Crall v. Commonwealth, 103 Va. 855, 859-60 (regional officers of an installment sales corporation doing business in 22 states).

advantages they secure for their corporation. The language cited by the appellee (motion to affirm, p. 11) obviously means only that the indictment charged the defendant officials with active and knowing participation in the alleged offense rather than merely being officers of the defendant corporations.

Appellee's statements with respect to the several decisions stemming out of the 1924 indictment of 52 corporations and 49 corporate officials for violating the Sherman Act through a combination and conspiracy in restraint of trade in malleable iron castings simply cannot be squared with the actual facts. Thus, appellee contends that the district court in United States v. National Malleable and Steel Castings Co., 6 F. 2d 40 (N.D. Ohio), "avoided ruling on the question" of whether Section 1 of the Sherman Act or Section 14 of the Clayton Act was applicable to the individual defendants (motion to affirm, p. 10). In fact, the court, while holding that the "criminal participation of the individual defendants * * * is sufficiently averred, within the authorities and within the terms" of Section 14 of the Clayton Act (6 F. 2d at 41), expressly concluded that "if the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of section 1 of the Sherman Act" (ibid.). Moreover, while neither of the opinions in the related cases of Mechan v. United States, 11 F. 2d 847 (C.A. 6), and United States v. Mathues, 6 F. 2d 149 (E.D. Penna.), "interpreted the indictment as intending to lay charges under Section 14", as appellee suggests (pp. 10-11), this Court, in United States ex. rel. Hughes v. Gault, 271 U.S. 142, the one case involving the indictment in the National Malleable proceeding to reach it, expressly held that Hughes, one of the 49 individual defendants, "was indicted for violation of the Anti-trust Act of July 2, 1890" (id. at p. 148), and that "[t]he relator [Hughes] is not left in doubt of the effort of the grand jury to present him as criminal under the Sherman Act" (id. at 151).

CONCLUSION

The question presented is an important one and probable jurisdiction should be noted.

Respectfully submitted.

Archibald Cox,
Solicitor General.
Lee Loevinger,
Assistant Attorney General.
Richard A. Solomon,
Attorney.

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Act indictment against the individual involved had sufficiently charged him with personal participation in the offense "either under the general principles involved or under section 14 of the Clayton Act" (11 F. 2d at 850). In the Mathues case the court, after describing the indictment as having charged both the corporations and the individuals with engaging in an illegal combination in restraint of interstate commerce under the Sherman Act (6 F. 2d at 150-151), merely cites Section 14 of the Clayton Act in support of its conclusion that the indictment sufficiently charged the defendants with actual participation in the alleged illegal combination (id. at 150).

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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

RAYMOND J. WISE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

ARCHIBALD COX, Solicitor General,

LEE LOEVINGER,

Assistant Attorney General,

DANIEL E. FRIEDMAN,

Assistant to the Solicitor General,

BICHARD A. SOLOMON,

PATRICK M. BYAN,

Attorneys,
Department of Justice,
Washington 25, D.C.

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The jurisdiction of this Court rests on the Criminal Appeals Act, 18 U.S.C. 3731.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1, as it appears in the United States Code, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. 24, as it appears in the United States Code, provides:

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

QUESTION PRESENTED

Whether a corporate officer may be prosecuted under the Sherman Act for antitrust violations committed in the course of his corporate duties.

STATEMENT

This is a direct appeal from an order of the District Court for the Eastern District of Missouri dismissing, as to a corporate officer, an indictment charging violations of the Sherman Act committed by him in his capacity as an officer. The ground of dismissal was that, since the official was charged solely in his "representative capacity" as a corporate officer, he could be prosecuted only under Section 14 of the Clayton Act, and not under the Sherman Act (R. 39). The relevant facts are as follows:

Counts 11 and 12 of the indictment (filed on September 16, 1959) charged the National Dairy Products Corporation ("National") and appellee Wise, a vice president and director thereof, with conspiring, together with designated co-conspirators and unknown persons, to eliminate price competition in the sale of fluid milk in the Kansas City area, in violation of Section 1 of the Sherman Act. Each of these counts alleged that, during the period covered thereby, Wise had been "actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged * * * to have been done by National" (R. 7, 9).

On January 24, 1961, Wise moved to dismiss counts 11 and 12 as to him on the ground that "they fail to charge him with an offense under Section 1 of the Sherman Act * * *" (R. 16). At the same time Wise moved for a bill of particulars requiring the government to state whether he was alleged to have participated in the offenses charged against him in those counts "as an individual acting for his own personal account" or "in any capacity other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violations alleged to have been committed" by National (R. 15). In a supporting statement (R. 17-18) Wise alleged that if he was "personally charged with engaging in the illegal conduct * * * solely as an officer, director or agent [of National Twho authorized, ordered or did acts" constituting the offenses charged against National, he could not be prosecuted under the Sherman Act, because "Section 1 of the Sherman Act does not impose criminal responsibility upon corporate officials charged only with authorizing, ordering or doing corporate acts constituting a corporate violation. To the contrary, the prosecution of corporate officials for such acts is governed by Section 14 of the Clayton Act, 15 U.S.C. § 24" (ibid.).

The district court denied the motion to dismiss, but sustained the motion for a bill of particulars insofar as it requested the foregoing information (R. 22). In response, the United States stated that Wise "is personally charged with actively and directly engaging in the illegal conduct charged in Counts Eleven and Twelve of the indictment," and that, in doing so, he was "acting solely in his capacity as an officer, director or agent who authorized, ordered, or did some of the

acts constituting in whole or in part the violations alleged also to have been committed" by National (R. 34).

Wise then renewed his motion to dismiss on the ground that "said counts, in themselves and as made more specific by [the] Bill of Particulars * * * fail to charge him with an offense under Section 1 of the Sherman Act * * * " (R. 35). The district court on June 14, 1961, granted the motion (R. 37-39) and, on August 10, 1961, entered an order dismissing counts 11 and 12 as to Wise (R. 41-42).

The court held that a corporate officer "charged solely in his representative capacity and not in any degree on an individual basis for his own personal account" may not be prosecuted under Section 1 of the Sherman Act but only under Section 14 of the Clayton Act (R. 39). The court stated (ibid.) that prior to the enactment of the Clayton Act in 1914 "confusion and uncertainty existed" as to the criminal responsibility of corporate officers under the Sherman Act, and that Congress in enacting Section 14 "intended to eliminate that uncertainty and confusion." The court concluded (ibid.) that "[u]nder clear Congressional interpretations, the Sherman Act governs the prosecution and punishment of principals, i.e., corporations and individuals acting on their own be-

¹ The district court had previously dismissed other counts of the indictment that charged National, and in one count Wise as well, with violating Section 3 of the Robinson-Patman Act, on the ground that that section is unconstitutionally vague. The validity of that holding is now before the Court in *United States v. National Dairy Products Corp.*, No. 173, this Term, probable jurisdiction noted, 368 U.S. 808.

half, while Section 14 of the Clayton Act covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation"; that this interpretation is "supported by the wording and legislative history of Section 14"; and that "[a]ny other interpretation would leave Section 14 without content or force."

SUMMARY OF ARGUMENT

The court below held that a corporate officer cannot be prosecuted under the Sherman Act for antitrust violations committed in his representative capacity (as distinguished from such violations committed "on an individual basis for his own personal account," R. 39), but only under Section 14 of the Clayton Act. The language of the Sherman Act, the criminal enforcement practices of the Department of Justice, the consistent course of judicial decision, and the legislative history of the Clayton Act, all compel the contrary conclusion. The ruling below frustrates the clear Congressional intent that Section 14 was to supplement, but not to supersede, the existing liability of corporate officials under the Sherman Act.

I

Sections 1-3 of the Sherman Act make "[e]very person" who violates their substantive provisions guilty of a misdemeanor. On its face, this broad language covers corporate officials. Moreover, when the Sherman Act was passed in 1890, it was settled that corporate officers who actively participated in illegal acts on behalf of their corporations were guilty of a crime, and the imposition of criminal liability

upon "[e]very person" who violated the standards of the Sherman Act embraced the commission of such acts by corporate officials. The applicability of the Sherman Act's criminal provisions to corporate officials is further supported by the fact that, during the period between 1890 and 1914, at least 40 indictments were filed by the government under that Act against corporate officials. Furthermore, Sherman Act indictments against such officials were upheld in a number of cases during that period, in none of which was it suggested that such liability existed only where the corporate official acted on his own behalf rather than for the corporation. The court below was clearly in error in concluding that, when the Clayton Act was enacted in 1914, "much doubt and uncertainty existed" (R. 38) as to the criminal liability of corporate officers under the Sherman Act.

H

The Clayton Act was passed to supplement the existing antitrust provisions of the Sherman Act. Section 14 of the Clayton Act provides that, whenever a corporation violates any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers or agents who shall have "authorized, ordered, or done" any of the acts constituting in whole or in part such violation. The legislative history of this section shows that it was intended to supplement, but not to supersede, the existing criminal liability of corporate officers under the Sherman Act. The sponsors of the legislation repeatedly stressed that the existing penal

provisions of the Sherman Act were not being changed, and that Section 14 was intended to broaden the criminal liability of corporate officials under the Sherman Act. The fact that conduct by corporate officials which would violate the Sherman Act would usually also violate Section 14, affords no basis for construing the latter as providing the sole method for prosecuting such officials. A criminal statute is not repealed by implication merely because a subsequent statute makes the same conduct illegal.

III

The applicability of the Sherman Act to antitrust violations committed by corporate officers is further supported by the enforcement practices of the Department of Justice following the enactment of the Clayton Act. After 1914, the government continued its practice of indicting corporate officials under the Sherman Act, and no challenge was made thereto until 1939, when the practice was upheld. See United States v. General Motors Corp., 26 F. Supp. 353 (N.D. Ind.), affirmed, 121 F. 2d 376 (C.A. 7), certiorari denied, 314 U.S. 618. If Section 14 had established the sole procedure for prosecuting corporate officials, one would assume that the government would have proceeded under the new section, or that corporate officials indicted under the Sherman Act would soon have moved to dismiss such indictments.

Prior to the decision below, every case which considered the relationship between the Sherman Act and Section 14 of the Clayton Act concluded that Section

14 did not provide the exclusive method for prosecuting corporate officials, and that they might also be prosecuted under the Sherman Act. See, e.g., United States v. General Motors Corp., supra; United States v. National Malleable & Steel Castings Co., 6 F. 2d 40 (N.D. Ohio); United States v. Atlantic Commission Co., 45 F. Supp. 187 (E.D.N.C.); cf. United States ex rel. Hughes v. Gault, 271 U.S. 142.

Further support for the view that corporate officers are criminally liable under the Sherman Act is found in the action of Congress in 1955 in increasing the maximum fine for violation of the Sherman Act from \$5,000 to \$50,000, but making no change in the \$5,000 fine under Section 14. The legislative history of that change shows that Congress intended to increase the penalties for individuals as well as for corporations. and that it refrained from increasing the fine under Section 14 only because the Department of Justice had advised that such increase was unnecessary insofar as Sherman Act prosecutions were concerned. If Section 14 were the sole method for prosecuting corporate officials, Congress plainly would have increased the penalty thereunder when it increased the Sherman Act penalties.

ARGUMENT

INTRODUCTION

In this case the district court held, for the first time since the Sherman Act was enacted over 70 years ago, that a corporate officer cannot be prosecuted under that Act for violations committed in his corporate capacity. According to the district court (R. 39), a corporate official "charged solely in his representative capacity and not in any degree on an individual basis for his own personal account" may be charged only under Section 14 of the Clayton Act. This novel holding is contrary to the language of the statutes, their legislative history, and the consistent course of judicial decision and criminal enforcement of the Sherman Act by the Department of Justice, both before and after the passage of the Clayton Act.

We turn first to the language. Section 1 of the Sherman Act (as amended) provides that "[e]very person" who engages in an illegal conspiracy, combination or contract in restraint of trade is guilty of a misdemeanor and, upon conviction, may be fined up to \$50,000, or imprisoned up to one year, or both;

² Since the decision below, four other district courts have reached the same conclusion. United States v. A. P. Woodson Co., 198 F. Supp. 582 (D.D.C.), appeal pending, C.A.D.C., Nos. 16,750, 16,763, 16,764, 16,765, 16,766, 16,767; United States v. American Optical Co., No. 61 Crim. 82 (E.D. Wisc., November 1, 1961), notice of appeal to this Court filed December 19, 1961; United States v. Milk Distributors Ass'n, Inc., Crim. No. 25658 (D. Md., December 29, 1961); United States v. General Motors Corp., No. 30,132 Crim. (S.D. Cal., February 12, 1962), notice of appeal to this Court filed February 16, 1962. On the other hand, in United States v. North American Van Lines, Inc., Crim. No. 527-61 (D.D.C., January 29, 1962), the district court recently denied a motion to dismiss a Sherman Act indictment against corporate officials, holding that they were properly charged under Sections 1 and 3 of the Sherman Act. See discussion, infra, p. 41. And on February 16, 1962 Judge Yankwich without opinion denied a similar motion in United States v. Packard-Bell Electronics Corp. et al., Criminal No. 30158 (S.D. Cal.).

and Section 7 of that Act defines "person" to include "corporations" and "associations." On their face, these provisions plainly cover both corporations and their officials. "Every person" obviously includes a corporate official, and if such officials engage in the conduct prohibited by the Act, they are subject to the Act's criminal provisions. There is nothing in the language of Section 1 that supports the district court's theory that, as applied to corporate officials, the word "person" means only an official who acted "on an individual basis for his own personal account," and not one who acted "solely in his representative capacity."

Section 14 of the Clayton Act provides that, whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation "shall be deemed to be also that of the individual directors. officers, or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation"; makes such violation a misdemeanor; and imposes a maximum fine of \$5,000, or maximum imprisonment of one year, or both. Again, there is nothing in this language which suggests that a corporate official who has violated the Sherman Act while acting in his corporate capacity cannot be prosecuted under that Act. On the contrary, the words of Section 14 at most impose an alternative liability on corporate directors, officers or agents who have advised, ordered or done any acts which constitute, in whole or in part, a violation of the antitrust laws committed by their corporation.

The district court held (R. 39), however, that prior to the enactment of the Clayton Act "confusion and uncertainty existed" as to whether corporate officials were criminally liable under the Sherman Act for acts done in their "representative" capacity; that Congress enacted Section 14 "to eliminate that uncertainty and confusion"; and that both "the wording and legislative history of Section 14" support the view that that section exclusively "covers the prosecution and punishment of individuals who, as corporate officials, took part in the corporate violation."

We shall show that, contrary to the views of the district court, there was no "uncertainty and confusion" prior to the passage of the Clayton Act as to whether corporate officials were criminally liable under the Sherman Act, but that such liability was well established; that the legislative history of the Clayton Act demonstrates that Congress intended Section 14 only to supplement and reinforce, and not to supersede in any way, the already-existing criminal liability of the corporate officials under the Sherman Act; that in the 46 years between the enactment of the Clayton Act and the decision below, the government continued to follow its pre-1914 practice of indicting corporate officials under the Sherman Act; and that during that period the courts repeatedly upheld the propriety of such indictments.

The significance of the issue is not limited to the fact that the maximum fine under the Sherman Act is \$50,000, and under the Clayton Act is only \$5,000, although the importance of the greater penalty as a deterrent upon corporate officials should not be minimized. The ruling below poses a number of serious substantive and procedural problems, some of which have already arisen and others of which are certain to develop in the future. For example, it has been held that corporate officials could no longer be indicted and tried together with their corporations under a single count, but would have to be charged in a separate count under Section 14. Allegations in an indictment previously deemed sufficient under the Sherman Act have been challenged as insufficient to charge a violation of Section 14. There may be difficult problems of trial procedure where corporate officials and their corporations are charged in separate counts under different statutes. The resolution of

^{*} In both the Woodson and the Milk Distributors' cases (supra, note 2), the district courts held that an indictment charging, in the same count, corporations with violation of the Sherman Act and their officers with violation of Section 14 of the Clayton Act, would be duplicitous.

In the General Metors case (supra, note 2), however, the district court dismissed as duplications a separate count charging the individual defendants with violating Section 14, presumably because the allegations of the preceding Sherman Act count were realleged.

supra, note 2), the individual defendants have contended (Br. pp. 35-38) that allegations sufficient to charge a corporation (and previously held sufficient to charge corporate officers) with violations of the Sherman Act are insufficient to charge violations of Section 14, since they do not detail the acts the individuals "authorized, ordered or did," and allegedly do not assert that the officers had knowledge of the intent of the conspiracy and the relation of the act to the conspiracy. In the absence of such a showing of intent, it is suggested, Section 14 might be unconstitutional.

these and many other questions that will inevitably arise will necessarily require extensive litigation, and the prompt prosecution of criminal cases, which is plainly necessary for effective antitrust enforcement, would be impeded.

I

PRIOR TO THE ENACTMENT OF THE CLAYTON ACT IN 1914,
IT WAS WELL ESTABLISHED THAT CORPORATE OFFICIALS
WERE CRIMINALLY LIABLE FOR VIOLATIONS OF THE
SHERMAN ACT COMMITTED IN THEIR CORPORATE
CAPACITY

Since Congress did not specify the extent to which corporate officials would be criminally liable under the Sherman Act (other than to prescribe that "[e]very person" who did any of the prohibited acts was guilty of a misdemeanor), it obviously intended to apply the normal rules governing the criminal liability of corporate officers. When the Act was passed in 1890, it had long been settled that corporate officials could be criminally prosecuted (with or without their corporations) for criminal corporate activity in which they personally participated. State v. Great Works Milling and Man. Co., 20 Me. 41; State v. The Morris & E.R. Co., 23 N.J. Rep. 360, 369; People v. Clark, 8 N.Y. Crim. Rep. 179, 14 N.Y. Supp. 642; Rex v. Hayes, 14 Ont. L.R. 201; Queen v. The Great North of England Ry. [1846]. 9 Q.B. 315, 326-327; see People v. Duke, 44 N.Y. Supp.

In a number of early cases the principal corporate officials were held liable, without any showing of actual participation or knowledge, for a nuisance committed by their corporation or where it operated without a license or franchise. See Rex v. Medley, 6 Car. & Payne 292 (K.B. 1834); City of Wyandotte v. Corrigan, 35 Kan. 21; People v. Detroit White Lead Works, 82 Mich. 471.

336, 19 Misc. Rep. 292 (indictment of officers of American Tobacco Company for conspiracy to injure trade and commerce); State v. Carmean, 126 Iowa 291; State v. Ross, 55 Ore. 450; cf. Tyler v. Savage, 143 U.S. 79, 97-98. No distinction was drawn between officials who committed such acts in their "representative" (corporate) capacity and those who acted in their own personal interest.7 The sole touchstone of liability was whether they had actively participated in the criminal acts of their corporation. Such liability apparently developed from the earlier principle that, in the case of misdemeanors, agents were criminally liable as principals with their superiors for those violations in which they had personally participated. See United States v. Gooding, 12 Wheat. 460, 471; United States v. Mills, 7 Pet. 138, 139-141.

In these circumstances, it is not surprising that, almost from the outset of the enforcement of the Sherman Act, the government indicted corporate officials who had participated in corporate violations; and that the propriety of such indictments, under the statute making "[e]very person" who violates its standards criminally liable, was soon judicially established.

⁷ In the latter case, however, the corporation might not be liable. See *Pharmaceutical Society* v. *London & Provincial Supply Ass'n*, *Ltd.*, *supra*, 5 Q.B.D. at 315.

^{*}Although Senator Sherman's original bill as introduced in the 50th Congress on August 14, 1888 (S. 3445, 50th Cong., 2d Sess.) did not include any provision for criminal sanctions, the amended bill as reported from the Finance Committee on September 11, 1888 contained as Section 3 a criminal provision specifying "That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section 1 of this Act, either on his own account or as agent or

A. PRIOR TO 1914, IT WAS THE SETTLED PRACTICE OF THE GOVERN-MENT TO INDICT CORPORATE OFFICIALS FOR VIOLATIONS OF THE SHERMAN ACT

We have set forth in Appendix A (infra, pp. 69-72) a table listing the numerous cases brought by the government between 1890 and 1914 in which corporate officials were indicted for violation of the Sherman Act. As there shown, the first of those cases were filed in 1892, only two years after the Act was passed. In that year two indictments were filed (United States v. Joseph B. Greenhut, et al., Cr. Nos. 461

attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor," punishable by a fine of up to \$10,000 or imprisonment for not more than five years (19 Cong. Rec. 8483-84).

No action was taken on this bill and a new bill, S. 1, was introduced by Senator Sherman into the 51st Congress on December 4, 1889. This bill contained a criminal section identical with Section 3 of S. 3445. But on February 27, 1890 Senator Sherman informed the Senate (21 Cong. Rec. 1765) that he had been instructed by the Committee on Finance to strike the entire criminal section. (This action is reflected in a committee print of S. 1 of March 18, 1890.) On March 21, 1890, he explained to the Senate that the Finance Committee had deleted the criminal provisions because Sections 1 and 2 were remedial and would be liberally construed if standing alone, whereas the inclusion of a criminal section might lead to a more restricted interpretation of the bill. See 21 Cong. Rec. 2456-2457.

In the meanwhile Senator Reagan had introduced a substitute bill making criminal the creation of a trust by "all persons engaged in the creation of any trust or as owner, or part owner, agent, or manager of any trust * * * or any owner or part owner, agent, or manager of any corporation using its powers * * * to create the trust. See 21 Cong. Rec. 1772. The Reagan substitute bill was subsequently adopted as an amendment to

and 570 (D. Mass.), United States v. Patterson, et al., Cr. No. 1215 (C.C. Mass.)) charging a large number of the officers of the Distilling and Cattle Feeding Co. (the "whiskey trust") and of National Cash Register Co., respectively, with violations of the Sherman Act. Although only one other such case was filed prior to 1900 (United States v. Moore (D.C. Terr. Utah, 1895)), between 1900 and 1914, 37 criminal

The bill as further amended was subsequently committed to the Committee on the Judiciary, which completely rewrote it and submitted it back to the Senate in the form in which it eventually passed. Senator Hoar, who assumed primary responsibility for the language of the bill as passed, stated that he would not explain it as its meaning was well understood (21 Cong. Rec. 3145). The only other explanation of the new language is contained in the brief statement by Senator Edmunds, chairman of the Judiciary Committee, that "we were trying to strike at great evils in a broad way and leave the details and difficulties that might afterwards arise to be repaired by legislation" (21 Cong. Rec. at 3148).

In that case a number of coal dealers, including two Salt Lake City agents of coal mining corporations, were indicted. The defendants were convicted and corporate agent Moore was fined \$200.00. The convictions were reversed on the ground that the court had lost jurisdiction when Utah became a state in 1896. See Moore v. United States. 85 Fed. 465 (C.A. 8).

S. 1 (21 Cong. Rec. 2560-61, 2611). Senator Sherman, who had originally opposed the Reagan bill on the ground that antitrust was a new subject and it was better to declare general principles and leave the question of criminal sanctions for later (21 Cong. Rec. 2562), subsequently changed his position and stated that "[t]he proposition made by the Senator from Texas [Reagan] is also in the right direction, and, after careful consideration of that proposition there can be no objection to it so far as anyone who is in favor of the principle of the bill is concerned," since "[i]t adds a criminal clause and defines somewhat the meaning of the words in the original bill" (21 Cong. Rec. at 2655).

actions under the Sherman Act were brought against corporate officials, in 27 of which both a corporation and one or more of its officers, directors or agents were indicted.

Most of the corporate officials indicted were the directors and/or the principal officers (President, Vice President, Secretary, Treasurer or General Manager), but in at least 14 cases lesser officials or agents were also charged. In no case was a corporate official indicted for actions other than those taken in his "representative capacity", i.e., in the performance of actions within the scope of his corporate functions for the corporate benefit.

In at least eight cases prior to 1914 ¹⁰ corporate officials pleaded guilty or *nolo contendere* and were fined; in three others ¹¹ they were convicted after trial

The judgments in these various cases are printed in Decrees and Judgments in Federal Anti-Trust Cases ("D. & J."), published by the Government Printing Office, 1918. United States v. Shotter Co. (S.D. Ga. 1907), D. & J. 707, 708; United States v. Imperial Window Glass Co. (W.D. Pa. 1910), D. & J. 748; United States v. William C. Geer (S.D.N.Y., 1911), D. & J. 758; United States v. Isaac Whiting (Cr. Nos. 453 and 454, D. Mass., 1911); United States v. Palmer et al. (9 related indictments in "wire pool" cases) (C.C.S.D.N.Y., 1911), D. & J. 760-775; United States v. New Departure Mfg. Co. (W.D.N.Y., 1912), D. & J. 785; United States v. American Wringer Co. (W.D. Pa., 1914), D. & J. 822; United States v. Daniel P. Collins (Sup. Ct. D.C., 1914), D. & J. 826-827.

¹¹ United States v. Phoenix Wholesale Meat & Produce Co. (D. Terr. Ariz., 1906), D. & J. 704-705 (conviction affirmed, sub nom. Tribolet v. United States, 95 Pac. 85); United States v. Standard Sanitary Mfg. Co. (E.D. Mich., 1910) D. & J. 755; United States v. Hunter Milling Co. (W.D. Okla., 1911), D. & J. 779.

and fined; and in three cases 12 they were convicted and the convictions were reversed on appeal, but not because the defendants were corporate officers.

B. THE JUDICIAL DECISIONS PRIOR TO 1914 CAST NO DOUBT UPON, BUT ON THE CONTRARY RECOGNIZED, THE CRIMINAL LIABILITY OF CORPORATE OFFICIALS FOR SHERMAN ACT VIOLATIONS COMMITTED IN THEIR CORPORATE CAPACITY

In considering whether corporate officials might be prosecuted under the Sherman Act for acts committed in their corporate capacity, the courts from the outset of Sherman Act enforcement applied the settled rule that corporate officials are criminally liable for illegal corporate activity in which they participate (see *supra*, pp. 14–15). None of the cases which involved the issue cast any doubt upon the liability of such corporate officials, and in several of them such liability was expressly recognized. We shall discuss the cases chronologically, since we believe that such a presentation will be helpful to the Court in ascertaining the state of the law on this subject when the Clayton Act was before Congress in 1914.

1. The first two cases involved the unsuccessful prosecution of the "whiskey trust," but neither of them directly ruled on the point. In *United States* v. *Greenhut*, 50 Fed. 469 (D. Mass., 1892), the court,

¹² United States v. Union Pacific Coal Co. (D. Utah, 1907),
D. & J. 720, reversed on appeal, 173 Fed. 737 (C.A. 8), see p.
24, infra; United States v. American Naval Stores (C.C.S.D. Ga., 1908),
D. & J. 729, reversed on appeal sub nom., Nash v. United States, 229 U.S. 373, see p. 25, infra; United States v. Patterson (S.D. Ohio, 1912),
D. & J. 795, reversed on appeal, 222 Fed. 599 (C.A. 6), certiorari denied, 238 U.S. 635, see p. 29, infra.

in sustaining a demurrer to the indictment on the ground that it failed to charge an offense under the Sherman Act, stated (p. 471):

Other questions presented under this indictment were argued by counsel, and among them the important questions * * * whether the things charged against the defendants were not rather the doings of the corporation than of its officers. In regard to these questions it is only necessary to remark that * * * they should not be decided finally against the government by the trial court * * *.

In In re Greene, 52 Fed. 104 (C.C. Ohio, 1892), a removal case involving the same indictment, the court explained that the issue of the liability of the corporate officials arose because the indictment failed to charge all but one of them with personal participation in the offense. The court did not suggest, however, that there would be any question as to their liability if they had been charged with actual participation in the illegal corporate acts. It stated (p. 119):

All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distilling & Cattle Feeding Company, a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. * * If the acts charged constitute criminal offenses, the Distilling & Cattle Feeding Company is the "person" who has committed the same. It would be unheard of in

criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law, without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses, there is no criminality by representation.

- 2. The first case in which a court specifically rejected the contention that corporate officials were not criminally liable for acts committed in their corporate capacities was United States v. Patterson, 59 Fed. 280 (C.C. Mass., 1893). The indictment in that case charged a number of officials of the National Cash Register Company with monopolization, in violation of Section 2 of the Sherman Act. A demurrer was filed, alleging, among other things, that the indictment was defective because the corporation had not been named as a defendant, and the individual defendants were alleged to have acted solely for the benefit of the corporation rather than for themselves (see the summary of defendants' argument in United States v. Patterson, 55 Fed. 605, 636-637 (C.C. Mass., 1893)). The district court, in rejecting this contention, stated (pp. 283-284):
 - * * neither the letter of the statute nor the philosophy of pleading conspiracies require that it should appear that the purpose was to engross, monopolize, or grasp into the hands of one of the persons indicted, or that the defend-

ants were interested in behalf of the party for whose benefit they combined to monopolize, engross, or grasp, or, indeed, what their relations were to that party.

3. The leading case of United States v. MacAndrews & Forbes Co., 149 Fed. 823 (C.C.S.D.N.Y., 1906), similarly recognized the criminal liability of corporate officers under the Sherman Act. case the indictment charged two corporations and their respective presidents with violations of Sections 1 and 2 of the Sherman Act; it alleged that the individuals "in their capacity as such officers, and on behalf and by authority of those corporations respectively, during the period of time in this indictment * * * did carry on the business aforesaid." (Record on Appeal in Nos. 209, 210, O.T., 1908, p. 6.) Demurrers were separately filed to the indictment by both the corporate and individual defendants, the former asserting that the acts were solely those of the individual defendants, the latter that the corporations alone were liable.

The district court rejected the defenses. Distinguishing the *Greenhut* and *Greene* cases, *supra*, as showing only "that courts have conclusively presumed that the relation between a corporation and its stockholder is not such that the latter can be held to criminal responsibility for a violation of the law in which he is not alleged to have personally participated" (149 Fed. at 832, emphasis added), the court ruled (*ibid.*, emphasis added):

It is not without significance that offenses as serious, in congressional opinion, as those created by this statute are made misdemeanors.

When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemeanors, and further declares that the word "person" as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. This is learnedly and fully treated by Van Brunt, J., in People v. Clark (O. & T.) 14 N.Y. Supp. 642, and I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment.13

The reliance by the district court below on the MacAndrews case as showing the existence of "much doubt and uncertainty" (R. 38) as to the criminal liability of corporate officers under the Sherman Act is clearly misplaced. The court in MacAndrews expressed no such "doubt and uncertainty"; on the contrary, it ruled that, if the officer had personally participated in the violation, he could be charged together with the corporation. Nor did the court, in referring to the

¹³ The Department of Justice files show that a similar contention that officers could not be indicted together with their companies was made in the contemporaneous case of *United States v. Virginia-Carolina Chemical Co.*, 163 Fed. 66, 70 (C.C.M.D. Tenn., 1908). The district court, in rejecting a demurrer, merely stated that "the indictment charges the defendants, in language both apt and with certainty of meaning, with acts denounced by statute as crimes."

officer's "personal participation," intend to draw any distinction between corporate officers acting in their "representative" and in their "individual" capacities (R. 39). As shown by the court's differentiation of the Greenhut and Greene cases, the court was merely pointing out that, unlike the individual defendants in those cases, the officers in the MacAndrews case were not being charged merely because their corporation had committed the alleged offenses, but because of their own active, and hence personal, participation in such offenses—as the indictment alleged.

The criminal liability of corporate officers under the Sherman Act was again recognized three years later in Union Pacific Coal Co. v. United States, 173 Fed. 737 (C.A. 8, 1909). In that case a coal company, two railroad corporations, the general western agent of the coal company and the superintendent of the rail carriers' business in Utah had been convicted and fined for violation of Section 1 of the Sherman Act (see D. & J. 720). The court of appeals reversed. The court first stated the general proposition that a corporation "is another and different person from any of its stockholders, * * * and no corporation can, by violating a law, make any of its stockholders who does not himself participate in that violation criminally liable therefor." (173 Fed. at 739, emphasis added.) concluded, however, that the evidence did not support the charge against the railroad companies and their agent, and that the coal company could not be guilty of combining with its own agent in violation of the law. In reaching this latter conclusion the court rejected the government's argument that a single corporate agent by his own act can be said to "combine" with his corporation "without the knowledge or participation of any other agent or officer of the corporation" (id. at 745), and held that "[t]he union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination" (ibid.). The court referred to the ruling in MacAndrews that corporate officials may be indicted under the Sherman Act where they have actively participated in the corporations' violation; it rejected the government's view, however, that MacAndrews also stood for the proposition that an illegal combination under the Sherman Act could be composed of a corporation and one of its officers.

In United States v. American Naval Stores Co., 172 Fed. 455 (S.D. Ga., 1909), a district court again recognized that corporate officers could properly be convicted under the Sherman Act. The indictment charged two corporations, the five chief officers of one corporation and the general manager of the other with violating Sections 1 and 2 of the Act. In its charge to the jury, the court assumed that the individual defendants could be convicted if they had committed the acts charged against them; the principal subject which the court explained was the basis on which the corporation might also be liable for the acts of its agents (172 Fed. at 463-464). The jury convicted five of the six individual defendants but failed to enter any verdict as to the two corporations. See Nash v. United States, 229 U.S. 373. In an appeal by the convicted defendants, "[i]t was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them ought to be set aside" (229 U.S. at 379). But this Court found it unnecessary to consider "whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations" (*ibid.*), since it held that the judgment in any event had to be reversed because of a faulty charge.

The court below cited (R. 38) this Court's decision in Nash as another case indicating confusion and doubt prior to 1914 as to the criminal liability of corporate officials under the Sherman Act. There is nothing in the decision, however, which even remotely suggests that corporations and their officials may not be jointly liable for the acts of the latter, or that such officials could be liable with their corporations only when they are acting on their own behalf, as distinguished from action on behalf of the corporation.

4. The contention that corporate officials could not properly be charged with responsibility for the illegal acts of their corporations was expressly rejected in *United States* v. *Swift*, 188 Fed. 92, 98 (N.D. Ill., 1911) and in *United States* v. *Winslow*, 195 Fed. 578 (D. Mass., 1912), affirmed, 227 U.S. 202. In both of those cases officials of various corporations (but not the

corporations) were charged with illegal combinations in restraint of trade and with monopolization. In the Swift case, involving charges against ten principal officers of three major meat packers, the defendants contended that the indictment "fail[s] to charge properly the defendants with responsibility for the acts done; that it appears that the defendants were officers of corporations, and that they could not be liable for corporate doings unless it appeared clearly that they knew of, connived at and directed the things done" (188 Fed. at 98). The court summarily rejected this argument. It stated (ibid.):

* * The answer to this is found in the indictment, which charges, not that the corporations, but that the groups of individual defendants, did what was alleged to be unlawful; and further, that the defendants managed and controlled the various corporations, and directed the corporate action. More was not necessary.

In the Winslow case, six individual officers of corporations which had joined to form the United Shoe Machinery Corporation were charged in separate indictments with violation of Sections 1 and 2 of the Sherman Act. In a demurrer they asserted that they were only officers and directors of their respective corporations and as such could not be charged under the Sherman Act (see Record on Appeal in No. 620, O.T., 1912, p. 50). The district court rejected the contention, stating (195 Fed. at 581–582):

* * * It is objected that the respondents are joined as officers of various corporations around which this litigation gathers, that one corporation is the principal, and that the respondents are only officers or directors thereof. The indictment, however, expressly charges them as actors, and two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals. The rule distinguishing between directors of a corporation who are simply charged as such and directors acting an immediate, special part in the proceedings in question, was pointed out and settled by the Circuit Court of Appeals for this circuit in National Cash Register Company v. Leland, 94 Fed. 502, 508, 509, 37 C.C.A. 372. Although that was a civil suit for damages on account of an infringement of a patent right, the principles apply here as well as there.

Appellee attempts (Motion to Affirm, pp. 12-13) to distinguish the Swift and Winslow cases on the ground that the corporate officers involved were the leading if not the majority stockholders of their respective corporations, and that their activities involved utilizing "the corporate form as a cover to further their own personal interests." But the ground on which the defendants in both cases demurred to the indictment was that, since they were charged solely because of their acts as corporate officers, they had not violated the Sherman Act. The decisions of the district courts upholding the indictments similarly made no distinction between corporate officials

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acting on their own behalf and those acting in a representative capacity.14

5. Finally, the litigation arising out of the 1912 indictment in *United States* v. *Patterson* (S.D. Ohio) is of particular importance in assessing the state of the law when the Clayton Act was under consideration. In that case 30 individuals, all officers and agents of the National Cash Register Company, were

¹⁴ In his motion to affirm, the appellee also relied on a summary of the Solicitor General's argument in an appeal subsequently taken to this Court from the dismissal of the indictment in one of the two Winslow cases. See United States v. Winslow, 227 U.S. 202. This summary (id. at 204) cites the Solicitor General as arguing that "individuals are subject to indictment for acts done under the guise of a corporation where the individuals personally so dominate and control the corporation as to immediately direct its action". In fact, what the Solicitor General argued in his brief is that "[i]t is well settled that individuals are criminally liable and subject to indictment for acts done in corporate form where the individuals themselves personally do or procure to be done such things; and it is no objection to the indictment that it alleges that the defendants did the acts complained of in the name of and through the instrumentality of a corporation" (Brief for the United States in No. 620, O.T., 1912, p. 12). The cases which the government cited in support of this proposition (and which are similarly cited by the reporter in the headnote to this Court's decision) include the MacAndrews & Forbes case, where, as noted above, the indictment expressly stated that the corporate officials were being charged because of activities undertaken "in their capacities as such officers and on behalf or by authority of those corporations." They also include a number of state cases (Crall and Ostrander v. Commonwealth, 103 Va. 855, 859-60; People v. Clark, supra; People v. White Lead Works, supra; People v. Duke, 44 N.Y. Supp. 336, 337-39; State v. Great Works Milling & Man. Co., 20 Me. 41) which clearly enunciate the proposition that any corporate officers may be indicted with their corporations wherever they actively participate in the corporate offense.

Act. These individuals included not only the major corporate officials but 6 district managers, 12 managers of branch offices, 3 agents, one attorney and one law clerk. In overruling a demurrer to the indictment in June 1912 (United States v. Patterson, 210 Fed. 697, 725–726), the court rejected the argument that only the corporation, and not the individual defendants, could commit the crimes. The court relied on the fact that the indictment charged that the defendants were the persons who controlled and directed the affairs of the company. Twenty-eight of the defendants were convicted, and on February 17, 1913, all were sentenced to jail and the president, Patterson, was also fined \$5,000 (D. & J. 795).

Although these convictions were subsequently reversed upon appeal (see Patterson v. United States, 222 Fed. 599 (C.A. 6)), this reversal did not occur until March 13, 1915, after the passage of the Clayton Act. When the Act was under consideration by the Congress, that body was well aware that Patterson and the other managers and subordinate officers of the Cash Register Company had been sentenced to jail under the Sherman Act. See, e.g., 51 Cong. Rec. 14325; see also Hearings Before the House Committee on the Judiciary (on H.R. 15657), 63d Cong., 2d Sess. (Serial 7, Part 6), pp. 271, 273.

Moreover, despite the recent passage of Section 14, the court of appeals had no doubt as to the liability of the corporate officials under the Sherman Act. The court held that Section 2 of the Sherman Act "includes conspiracies * * * between the officers and agents of a competitor on its behalf against a competitor" (222 Fed. at 618); and also that the evidence would have supported the conviction of the corporate officials for restraint of trade, since the evidence showed they had all actively participated in the conspiracy (id. at 631-633). The grounds of reversal were that evidence had been erroneously excluded and that the charge to the jury was improper (id. at 648-650).

In sum, none of the reported decisions prior to 1914 had cast any doubt upon the liability of corporate officials for Sherman Act violations committed in their representative capacity. On the contrary, such liability was well established when Congress considered the Clayton Act, as is shown both by the enforcement practices of the Department of Justice and by the numerous cases which had expressly recognized it.

II

THE LEGISLATIVE HISTORY OF THE CLAYTON ACT SHOWS
THAT CONGRESS INTENDED SECTION 14 OF THE CLAYTON
ACT TO SUPPLEMENT, BUT NOT TO SUPERSEDE OR LIMIT,
THE EXISTING LIABILITY OF CORPORATE OFFICIALS UNDER
THE SHERMAN ACT FOR ANTETRUST VIOLATIONS COMMITTED IN THEIR CORPORATE CAPACITIES

As we have shown in Point I, the broad language of the Sherman Act plainly covers corporate officials acting in their representative capacity; and, prior to 1914, the Act had been consistently viewed as reaching such conduct, both by the many courts that had considered the question and by the Department of Justice in its criminal enforcement of the statute.

The critical question in this case, therefore, is whether liability under the Sherman Act was superseded by the enactment of Section 14 of the Clayton Act. The legislative history of the Clayton Act shows that it plainly was not superseded.

A. We start with the "cardinal principle of construction that repeals by implication are not favored." United States v. Borden, 308 U.S. 188, 198-199. In reversing a lower court ruling that the criminal provisions of the Agricultural Marketing Agreement Act of 1937 had superseded the criminal provisions of Section 1 of the Sherman Act, this Court stated (ibid.):

When there are two acts upon the same subject, the rule is to give effect to both if possible. United States v. Tynen, 11 Wall. 88, 92; Henderson's Tobacco, 11 Wall, 652, 657; General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61, 62. The intention of the legislature to repeal "must be clear and manifest." Red Rock v. Henry, 106 U.S. 596, 601, 602. It is not sufficient, as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, "to establish that subsequent laws cover some or even all of the cases provided for by the [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnancy between the provisions of the new law, and those of the old: and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy." See, also, Posados v. National City Bank, 296 U.S. 497, 504.

The critical inquiry thus is not whether Section 14 of the Clayton Act covers some conduct by corporate officers which would also violate the Sherman Act (as it admittedly does), or whether Section 14 was intended to minimize the effect of alleged "uncertainty and confusion" (R. 39) as to the extent to which corporate officials were liable under the Sherman Act, by supplementary liability under that Act. For the decision of the district court could stand only if it were clearly shown that Congress, in adopting Section 14, had a "clear and manifest" intent to repeal Sherman Act liability. No such showing has, or can, be made; on the contrary, Congress in 1914 was well aware of the Sherman Act liability of corporate officers and had no intention to repeal or limit it.

1. Although it was settled in 1914 that corporate officers were criminally liable under the Sherman Act for violations in which they had actively participated in performing their corporate duties (see Point I, supra), the attempts to enforce such criminal liability

In 1900, at a time when antitrust enforcement had reached a virtual standstill as a result of this Court's decision in United States v. E. C. Knight, 156 U.S. 1, and the three attempts to prosecute corporate officers had been unsuccessful (see pp. 16-17, supra), the House, but not the Senate, passed a general revision of the Sherman Act (H.R. 10539, 56th Cong., 1st Sess.). This revision proposed, inter alia, to amend Section 8 to include "agents, officers, and attorneys" of corporations and associations within the definition of the word "person." The sponsors of the legislation indicated that in the absence of such a definition the action of such corporate officials "as such agents, officers, and attorneys did not subject them to any penalties under the law " " (H. Rep. No. 1506, 56th Cong., 1st Sess., p. 2; see also 33 Cong. Rec. 6477). It is arguable that this statement referred merely to the admitted lack

al.

had been unsatisfactory. Most of the corporate officials indicted under the Sherman Act had not been convicted. Few of those who had been convicted had been fined more than a nominal amount; none had gone to jail, although the defendants in the Patterson case (supra, p. 30) had been given jail sentences. The members of Congress who were strong supporters of the antitrust laws were of the view that there would be no adequate enforcement of those laws until more severe punishments were imposed on corporate officials, since the fines imposed on large corporations were treated as a minor expense of doing business in a profitable, albeit illegal, manner. See, e.g., 47 Cong. Rec. 3218, 3535-3536; 48 Cong. Rec. 10554, 50 Cong. Rec. 3219-3220; 51 Cong. Rec. 1978 (President Wilson's Antitrust Message to Congress).

Commencing in 1911 a number of bills, none of which was passed, were introduced to extend the liability of corporate officers. See H.R. 12624, 62d Cong., 1st Sess. (amending Sections 1–3 of the Sherman Act to provide that conviction of any corporation or corporate officer "shall constitute a presumption as to the equal guilt of the president and other executive officer or officers, and of each member of the Board

of criminal responsibility of such officials for corporate actions subject to their general supervision but in which they had not actually participated. See In re Greene, supra. But assuming that the House in 1900 mistakenly believed that an amendment to Section 8 of the Sherman Act was necessary to make corporate officials liable for their own acts, this no more establishes the intent of Congress in 1914 than the fact that the House in 1900 believed that a constitutional amendment was necessary to obviate the problems presented by the Knight case. See H.J. Res. 138, 56th Cong., 1st Sess.

of Directors and Executive Committee, and the members of any Board or Committee * * * having the control or management of the affairs of such corporation"); S. 3345, 62d Cong., 2d Sess. ("any person * * * entering into any such contract or engaging in any such combination or conspiracy * * * whether acting individually or as a member of a partnership or director, officer or agent of a corporation shall be punished by imprisonment not exceeding one year * * * "); S. 1375 (63d Cong., 1st Sess. (same provisions as S. 3345)). Section 14 of the Clayton Act was the culmination of these efforts.

2. "The Clayton Act, as its title 16 and the history of its enactment disclose, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890" (Standard Co. v. Magrane-Houston Co., 258 U.S. 346, 355). The substantive provisions of the antitrust laws were strengthened by Sections 2, 3, 7 and 8 of the Clayton Act, which respectively prohibited certain discriminations in price, exclusive dealing and tying contracts, stock acquisitions and interlocking directorates. Section 14 was designed to strengthen antitrust enforcement by insuring the criminal liability of corporate officials resposible for antitrust violations. It provided that a corporation's violation of any of the penal provisions of the antitrust laws "shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized,

¹⁶ "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." 38 Stat. 730.

ordered, or done any of the acts constituting in whole or part such violation."

The basic outline of Congressional consideration of Section 14 can be briefly summarized. The original bill introduced by Representative Clayton contained a section which provided that a corporation's guilt under the antitrust laws should be deemed to be that of the officers, directors and agents who had "authorized, ordered or done any of such prohibited acts" (Section 12, H.R. 15657, 63d Cong., 2d Sess.). During the debates, the House adopted an amendment by Representative Lenroot, which made it clear that a corporation would not have to be convicted prior to conviction of its officials (51 Cong. Rec. 9681-82). The House rejected a proposed amendment by Representative Volstead to substitute a provision that any person "who shall do, or cause to be done, or shall willingly suffer or permit to be done" any act prohibited by the antitrust laws, or aid and abet the violation, would himself be guilty of the violation (51 Cong. Rec. 9678).17 After the House had passed the bill (51 Cong. Rec. 9911), the Senate substituted a provision which limited the coverage of the section to the "penal" provisions of the antitrust laws, and which would have "deemed" the directors, officers or agents of corporations violating the antitrust laws guilty of

¹⁷ Representative Floyd opposed the Volstead amendment as "too drastic" and because it "goes too far" (51 Cong. Rec. 9676). Under the Volstead language making corporate officers liable who "willingly suffer or permit to be done" prohibited acts, acquiescence would have been enough to impose criminal liability. Under the provision adopted, positive action of some kind was required.

a misdemeanor where they had "aided, abetted, counseled, commanded, induced or procured such violation." See S. Rep. 698, 63d Cong., 2d Sess., p. 74; 51 Cong. Rec. 14329. The Conference Committee adopted the House provision, except that it retained the Senate's dimitation of the section to violations of the "penal" provisions of the antitrust laws. 51 Cong. Rec. 15640.

3. While none of the many Congressmen who spoke on the subject during the lengthy debates disagreed with the objective of what subsequently became Section 14, and, with one possible exception, all recog-

"What I mean to say is this: Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that act, the guilt of that corporation would not be visited upon the individual director or agent or officer who authorized or committed or induced the act. This section is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation." (Ibid., emphasis added.)

We interpret this subsequent explanation by Senator Culberson as indicating that he was aware of the liability of corpo-

¹⁸ In the course of the Senate debates with respect to the amendment proposed by the Judiciary Committee to limit the section to "penal" provisions of the antitrust laws, Senator Kenyon observed that "the penal provisions of the Sherman Act, Sections 1 and 2, carry a penalty within themselves and are complete within themselves, and this section would add nothing to that." (51 Cong. Rec. 14325.) Senator Culberson, in charge of the bill for the Judiciary Committee, responded: "The Sherman Act provides the penalty where the corporation acts, and it is against the corporations. This provision penalizes the individuals who act for the corporation and is, as it has been very often termed, the personal guilt portion of the bill" (ibid.) This statement was immediately challenged by Senator Kenyon, who asked: "The Senator does not claim that section 1 of the Sherman Act does not penalize the individual?" Senator Culberson responded:

nized the existing Sherman Act liability of corporate officers actively participating in an offense, ¹⁹ there was considerable disagreement as to whether the provision would achieve its objectives. Much of the opposition to the proposal stemmed from the fact that the section, as originally drafted (and as subsequently sought to be amended by the sponsoring committee), was subject to the construction that before a corporate officer could be convicted, or even charged, there would have to be a *prior* conviction of the corporation. See e.g., 51 Cong. Rec. 9679–81. In addition, a number of Congressmen, led by Representatives Volstead and Nelson, opposed the provision because they believed that framing the standard for criminal liability in

rate officials under the Sherman Act and was stressing instead that the new provision went beyond this liability to "visit" upon responsible corporate officials "punishment for the act of the corporation" as contrasted with punishment for their own acts. In any event, Senator Culberson was the only member of Congress whose statement can be read as expressing doubt as to the existing liability of corporate officials under the Sherman Act. ¹⁹ See statement of Representatives Volstead (51 Cong. Rec. 9079, 16203); Nelson (51 Cong. Rec. 9169); Green (51 Cong. Rec. 9201, 9596); Campbell (51 Cong. Rec. 9201); Towner (51 Cong. Rec. 9202); Floyd (51 Cong. Rec. 9608, 9679, 16317, 16320); Barkley (51 Cong. Rec. 9681): Webb (51 Cong. Rec. 16275); Lenroot (51 Cong. Rec. 9681); and Senator Shields (51 Cong. Rec. 14214); Reed (51 Cong. Rec. 14226); Clapp (51 Cong. Rec. 14324); Kenyon (51 Cong. Rec. 14324, 14325); Cummins (51 Cong. Rec. 14328); Walsh (51 Cong. Rec. 16143). The existing liability of corporate officers had also been expressly brought to the attention of the House Judiciary Committee during the hearings on the Clayton Bill by Mr. Levy, one of the government prosecutors in the MacAndrews & Forbes case. See Hearings Before the House Committee of the Judiciary (on H.R. 15657), 63d Cong., 2d Sess., Serial 7, Part 6, pp. 270-71.

terms of whether the officials had "authorized, ordered, or done" the acts constituting the corporate violation imposed a less stringent standard than, and hence represented a retreat from, the general aiding and abetting statute which had been passed in 1909.

In the discussions between these various opponents and Representative Floyd, who was the spokesman for the Committee majority (and to a somewhat lesser extent, in the statements of Representatives Barkley, Webb and Lenroot), the intent and meaning of the section as adopted was elucidated. These discussions revealed that the provision sought to go beyond the then-existing Sherman Act liability of corporate officials who actively participated in their corporation's offense, and to make all corporate officials liable for a corporate violation whenever they were involved in the violation. At the same time, in response to the expressed concern that the new language might be restrictively interpreted, the advocates of the provision made clear that the existing Sherman Act liability of corporate officers was to remain in effect, and that resort to Section 14 would be unnecessary where the Sherman Act had been violated.

We have set out the pertinent portions of these statements and colloquies in Appendix B, infra, pp. 73-80. The views of the sponsors of the provision are well summarized in Representative Floyd's final statement, during the debate on the Conference Report, that—

^{* * *} under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator,

and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation then he may be convicted as an individual. [51 Cong. Rec. 16320]

This statement does not stand alone. Representative Floyd had previously stated that "[u]nder the existing law * * * the person who did the things would undoubtedly be guilty" (51 Cong. Rec. 9609; see id., 9676); that "if the individual independently had violated the Sherman Act and was guilty of violation of it in any way as an individual, he could be convicted without ever convicting the corporation" (id., 9678); that the new section "in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law he can be indicted independently of this provision" (id., 9679); and that

* * * we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have, on the contrary, supplemented the penal provisions of the Sherman law * * *. [Id., 16317, emphasis added.]

The Senate Committee report on the bill similarly pointed out (S. Rep. No. 698, 63d Cong., 2d Sess., p. 1):

1

* * It is not proposed by the bill or amendments to alter, amend, or change in any respect the original Sherman Antitrust Act of July 2, 1890. The purpose is only to supplement that act and the other antitrust acts referred to in section 1 of the bill.

The legislative history of Section 14 was recently described by Judge Matthews of the District Court for the District of Columbia as making it "abundantly clear, however, that Congress did not intend by this section to supplant the penal provisions of the Sherman Act, or to relieve from liability any violators of such provisions" (United States v. North American Van Lines, Inc., D.D.C., Cr. No. 527-61, memorandum opinion of January 29, 1962).20 In denying a motion by corporate officers to dismiss, as to them, an indictment charging them and their corporations with violating Sections 1 and 3 of the Sherman Act, Judge Matthews concluded that "certainly no reasonable basis can be found in the legislative history for the contention that by Section 14 Congress intended or desired to limit in any way the application of any part of the Sherman Act. To the contrary, this history makes it plain that it was the purpose of Congress to maintain all the penal provisions of the Sherman Act in undiminished force" (App. C, infra, p. 88).

B. None of the grounds upon which appellee attempts to refute this legislative history is valid.

1. Appellee argues (Motion to Affirm, pp. 15-16) that the following statements in the committee reports show that Section 14 was intended "to establish and to govern the liability of corporate officials":

Section 12 [which became Section 14] is the personal guilt provision of the bill. It provides that whenever a corporation shall be guilty of

²⁰ The opinion has not yet been reported. It is reprinted in Appendix C, infra, pp. 81-93.

a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation, and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered, or done any of such prohibited acts shall be deemed guilty of a disdemeanor and upon conviction therefor shall be punished as prescribed in this section. [H. Rep. No. 627, 63d Cong., 2d Sess., p. 20.]

Existing antitrust acts are further supplemented by a provision that whenever a corporation shall violate the antitrust acts such violation shall be regarded as that also of the individual directors and officers of the corporation who shall have authorized, ordered, or committed any of the acts constituting such violation, thus fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law. [S. Rep. No. 698, 63d Cong., 2d Sess., pp. 1–2.]

These statements contain no suggestion that Section 14 was intended to supersede the existing Sherman Act criminal liability of corporate officials, and do not overcome the repeated assurances given by the sponsors of the legislation to the Congress that the Clayton Act was not intended to change the penal provisions of the Sherman Act.

Both reports did no more than summarize what the section provided. The section was "the personal guilt provision of the bill" because it was the only section of the bill that dealt with criminal liability; the other sections prohibited certain anticompetitive practices, and dealt with civil enforcement remedies. The guilt was "personal" in that it related to the guilt of indi-

viduals, as distinguished from that of their corporations. The statement that, upon conviction of violating Section 14, the corporate official was to be "punished as prescribed in this section" was merely a summarization of the provision that, upon conviction, an individual "shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." It cannot be read as implying that the only punishment to be imposed upon corporate officials for violation of the antitrust laws was to be that "prescribed in this section."

Similarly, the statement in the Senate Committee Report that the provision had the effect of "fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law" does not indicate, or even suggest, that such individuals could not also be prosecuted under the Sherman Act. The bill "fixed" their personal guilt only in the sense that it specified that corporate antitrust violations were also to be regarded as the violations of the corporate officials who had authorized, ordered or committed any of the acts constituting such violation. It did not thereby "unfix" their personal guilt under the Sherman Act for their violations of that statute. On the contrary the Senate Report stated that "[e]xisting antitrust laws are further supplemented" by the new provision.

Whenever a corporate official is guilty of violating the antitrust laws, he is "personally" guilty in the sense that he is being punished for his own personal active participation therein. Such "personal" guilt is to be distinguished from the vicarious criminal liability that some statutes impose upon corporate officers for actions done by the corporation, whether or not they personally participated therein (see note 21, infra, p. 45).

2. Appellee also urges (Motion to Affirm, p. 7) that, unless Section 14 is construed as providing the exclusive method for prosecuting corporate officials, it has no meaning; and that settled rules of statutory construction preclude such a result. Neither the premise nor the conclusion of this argument is correct.

The legislative history of Section 14 demonstrates that Congress enacted that Section in order to reach certain conduct by corporate officials which it believed could not be successfully prosecuted under the Sherman Act. As Representative Floyd explained (51 Cong. Rec. 9609):

* * * The purpose we had was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered, or did the thing prohibited should be guilty. Under the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty; but in the enforcement of the criminal provisions of the Sherman law. experience has demonstrated that both juries and courts are slow to convict men who have simply done acts authorized or ordered by some officers of the concern higher up, and the words "authorized" and "ordered" were introduced to reach the real offenders, the men who caused the things to be done; and if the language is

susceptible of any ambiguity and is not clear, we desire to make it clear. * * *

Representative Floyd further pointed out (51 Cong. Rec. 16320) that the provision was intended to permit prosecution of corporate officials for any acts which, although not constituting "the whole offense" or not sufficient to make them conspirators (and hence not sufficient to establish their guilt under the Sherman Act), would nevertheless "constitute in whole or in part that [corporate] violation."

There is an obvious difference between authorizing something to be done and actually ordering or doing it. It was not clear in 1914 whether corporate officers and directors who merely authorized antitrust violations could be criminally prosecuted under the Sherman Act. For example, if a regional manager, at the direction of a vice president, engaged in predatory pricecutting for the purpose of driving a competitor out of business, both officials would plainly have violated the Sherman Act. If, however, the regional manager on his own initiative decided to embark upon such a program, and the vice president had merely authorized such action, it was doubtful whether the courts would then have viewed the latter as having violated the Sherman Act. Congress plainly intended to reach such conduct by higher officials, however, under the broader standard of Section 14,21 which

²¹ It is also possible to distill from the legislative debates on Section 14 an indication that a limited degree of absolute liability was being imposed upon responsible corporate officers for violations of the antitrust laws by their subordinates. See 51 Cong. Rec. 5609, 5676, 5681, 14324. This responsibility did not go so far as that imposed upon corporate officials under the 1906 Pure Food and Drug Laws, where a responsible officer

made criminal acts by "individual directors, officers or agents * * * who shall have authorized * * * any of the acts constituting in whole or in part" the corporate violation. As Representative Floyd explained, "we are seeking to reach the directors and the high officers of these corporations who authorize or direct their employees to do acts which constitute violations of the antitrust laws" (51 Cong. Rec. 9676). "We cannot reach the men who are directly responsible, the men who authorize and direct the acts to be done * * * the rich director or officer who sits back in his room and directs the employee to do the things prohibited * * * is never touched and never convicted" (51 Cong. Rec. 9678).

Similarly, if corporate officers had undertaken a predatory campaign to monopolize a market, the general authorization and ratification of such program by the directors might not have been regarded as suffi-

of a corporation violating its provisions may be guilty of a misdemeanor even if he is totally unaware of the activities constituting the violation (see United States v. Dotterweich, 320 U.S. 277). But statements by both Congressmen Floyd and Lenroot (see Appendix B, infra) indicate that Congress intended to impose absolute liability upon any corporate officer authorizing, ordering, or himself doing anything which is in fact part of an antitrust violation, regardless of their knowledge of the objective of the entire course of action. Such an imposition upon major corporate officials of criminal liability regardless of their degree of knowledge of the offense, as a prophylactic measure to insure that they exercise particularly close supervision over their subordinates, was not unusual at the time of the Clayton Act. See, in addition to the Pure Food and Drug Act, supra, the Revenue Act of 1918, Section 1308(d), 40 Stat. 1143; Merchant Marine Act, 1920, Section 30J(b), 41 Stat. 1003.

cient in 1914 to subject them to criminal liability. They were plainly covered, however, by Section 14.

The precise extent of any additional liability that Section 14 may actually have imposed upon corporate officials presents a difficult question. But there is no need here to determine the precise boundaries of such liability. For it is beyond dispute that Congress, in enacting Section 14, at least thought it was imposing some new criminal liability on corporate officials that went beyond their existing Sherman Act liability. See 51 Cong. Rec. 9609, 9676, 9678-9679, 9681, 16320, Appendix B, infra, pp. 73-80. While it may not be clear precisely how far Congress went and what it actually accomplished in Section 14, beyond reaffirming the criminal liability of corporate officials responsible for their corporations' Sherman Act violations, it is clear from the legislative history what Congress did not do. It did not repeal or in any way limit the existing Sherman Act liability of corporate officials.

It is thus beside the point that most conduct by corporate officials that violates the Sherman Act would also violate Section 14. For a criminal statute is not repealed merely because a subsequent statute also penalizes the same conduct. See *United States* v. Gilliland, 312 U.S. 86, 95–96; United States v. Beacon Brass Co., 344 U.S. 43; Rosenberg v. United States, 346 U.S. 273, 294; Berra v. United States, 351 U.S. 131, 134. In the present case, as we have shown (supra, pp. 10–11), the language of Section 1 plainly covers appellee. and the legislative history of the Clayton Act confirms that Congress intended such

eriminal liability of corporate officials to remain unimpaired. There is thus neither the "positive repugnancy" between the provisions of the Sherman Act and Section 14 of the Clayton Act, nor that "clear and manifest" "intention of the legislature to repeal" (United States v. Borden Co., 308 U.S. 188, 198–199), which is necessary for repeal by implication.

III

THE POST-1914 CRIMINAL ENFORCEMENT OF THE SHER-MAN ACT, THE JUDICIAL DECISIONS, AND THE 1955 IN-CREASE IN THE SHERMAN ACT'S CRIMINAL PENALTIES, ALL SHOW THAT SECTION 14 DOES NOT PROVIDE THE EXCLUSIVE METHOD FOR PROSECUTING CORPORATE OFFI-CIALS FOR ANTITRUST VIOLATIONS

The government's position that corporate officials may be prosecuted under the Sherman Act is further supported by the history of criminal antitrust enforcement following the enactment of Section 14. This history shows that, after the passage of the Clayton Act, the government continued to follow its established practice of indicting corporate officials under the Sherman Act; that this practice was not challenged until 1939, and was then upheld; that, prior to the decision below, no court had ever held that corporate officials could not be prosecuted under the Sherman Act; and that every reported decision which considered the issue upheld the Sherman Act prosecution. In addition, the action of Congress in 1955 in increasing the maximum fine under the Sherman Act from \$5,000 to \$50,000, but making no change in the \$5,000 fine under Section 14, further confirms

that Section 14 was never intended to exclude prosecution of corporate officials for antitrust violations under the Sherman Act.

The court below discounted this history, on the ground that whether a corporate official was liable under the Sherman Act or under Section 14 "constituted no problem" until the Sherman Act fines were increased in 1955 (R. 39). But it is most improbable that, if Section 14 became the sole method for prosecuting corporate officials for antitrust violations, they would not have sought dismissal of Sherman Act indictments against them and, if such indictments were upheld, have sought appellate review.

A. THE GOVERNMENT, AFTER ENACTMENT OF THE CLAYTON ACT, CONTINUED TO PROSECUTE CORPORATE OFFICIALS UNDER THE SHERMAN ACT

If Section 14 of the Clayton Act was intended to be the sole method for prosecuting corporate officials after 1914, one would suppose that the government would promptly have changed its prior settled practice of prosecuting such persons under the Sherman Act. But, in the five years following the enactment of the Clayton Act, there were at least 15 indictments filed charging corporate officials with violations of the Sherman Act.²² A number of these indict-

²² See United States v. William Rockefeller (S.D.N.Y., 1914); United States v. Isaac Chapman (S.D.N.Y., 1915); United States v. Michael Boyle (N.D. Ill., 1915); see 259 Fed. 803 (C.A. 7) (affirming conviction of individual defendants); United States v. S. H. Cowell (D. Ore., 1916), see 295 Fed. 577 (C.A. 9) (sustaining conviction and fine of two individual

ments included, as defendants, agents or employees ranking well below the principal corporate officer level. Although all of these individuals were indictable under Section 14, the indictments never referred to that section or utilized its language. Nor did any of these indictments allege or otherwise suggest that the officer was acting on his own account. During the same period, the government brought no indictment under Section 14.

The same pattern continued unchanged for the next forty years. During this period corporate officials ranging from presidents and chairmen of the boards of directors to salesmen and other lesser agen's were indicted in more than two hundred cases for violations of the Sherman Act; in none of these indictments was there any reference to Section 14 of the Clayton Act. Up to 1939, the indictments generally stated that the individual defendants "have been actively engaged" in "conducting the business and affairs" of the corporation (see, e.g., United States v. Louis Bregler Co. (N.D. Ill., 1921), or in "the mangement, direction and con-

defendants); United States v. Jensen Creamery Co. (D. Idaho, 1917); United States v. Aileen Coal Co. (S.D.N.Y., 1917); United States v. Algoma Coal & Coke Co. (S.D.N.Y., 1917); United States v. Baker-Whiteley Coal Co. (S.D.N.Y., 1917); United States v. Mead (S.D.N.Y., 1917), D. & J. 860 (guilty pleas); United States v. Chicago Mosaic & Tiling Co. (N.D. Ill., 1917); United States v. M. Piowaty & Sons (D. Mass., 1917); United States v. Walter G. St. Clair (Sup. Ct. D.C., 1917); United States v. Thomas Barton (W.D. Va., 1917); United States v. Constantine Belfi (E.D. Pa., 1917), see 259 Fed. 822 (affirming convictions of eight of ten defendants convicted); United States v. Sumatra Purchasing Corp. (S.D. N.Y., 1918) (indictment under Sherman Act and Wilson Tariff Act, 15 U.S.C. 8-10).

trol" of corporate "affairs" (see, e.g., United States v. The Atlas Portland Cement Co. (S.D.N.Y., 1921). Thereafter, the indictments with increasing frequency used the language of Section 14 of the Clayton Act to detail the participation of the defendant corporate officers in the conspiracy, i.e., that such officials had "authorized, ordered or done the acts" charged. As we shall show in the next section, the practice of using this language in Sherman Act indictments had judicial sanction. In view of the practical difficulties inherent in attempting to try corporations and their officers together under the two statutes, however, the government has followed the policy of continuing to prosecute corporate officials under the Sherman Act. Prior to the decision below there had been only one case in which a corporate official had been indicted under Section 14 (United States v. Potts, Criminal 56-157-M (D. Mass.), filed June 28, 1956 (after maximum Sherman Act fines had been increased)).23

B. THE JUDICIAL DECISIONS SUBSEQUENT TO THE ENACTMENT OF THE CLAYTON ACT HAVE THELD THE PROSECUTION OF CORPO-RATE OFFICIALS UNDER THE SHERMAN ACT

Following the enactment of the Clayton Act, a number of courts again considered whether corporate officials were properly charged under the Sherman Act for antitrust violations committed in their corporate

²³ The indictment, which is solely under Section 14, charged that Potts was New England Divisional Manager of Socony Mobil Oil Co., that Socony had entered into å number of contracts with service station operators in violation of Section 1 of the Sherman Act by which in return for an agreed rebate the dealers agreed to fix the prices at which they sold gasoline, and that Potts authorized acts constituting part of the offense by authorizing specific rebates. The indictment was subsequently dismissed prior to any clarifying litigation.

capacity. Those cases consistently upheld the validity of the Sherman Act charges, and rejected any suggestion that Section 14 of the Clayton Act provides the exclusive method of prosecution.

1. The first references to Section 14 in reported decisions are in the series of cases growing out of the 1924 indictment in United States v. National Malleable & Steel Castings Co. (Cr. 8015, N.D. Ohio). That was a single court indictment charging 52 corporations and 49 of their officers with violating Section 1 of the Sherman Act. It did not cite Section The indictment alleged with respect to the individual defendants that the corporate defendants "had divers officers and agents who have been actively engaged in the management, direction and control of their affairs and business", and that both corporate and individual defendants had each knowingly "engaged in a combination in restraint of said interstate trade and commerce in malleable iron castings so carried on by said corporate defendants".

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In United States v. National Malleable & Steel Castings Co., 6 F. 2d 40, 41 (N.D. Ohio), the district court upheld the indictment against a demurrer alleging that the participation by the individual defendants in the alleged violations had not been sufficiently averred. It stated:

The criminal participation of the individual defendants, as officers having the active management, direction, and control of the interstate trade and business of the corporate defendants engaged in the illegal combination or conspiracy, is sufficiently averred, with in the authorities and within the terms of section 14, Act

Oct. 15, 1914, known as the Clayton Act (Comp. Stat. § 8835m). The elements of the crime are not only charged in the language of the statute, but the means whereby the combination or conspiracy is and has been formed and carried on, and the details thereof adequate to identify the specific combination or conspiracy, and to enable the defendants to prepare for trial and to protect them against a new prosecution in the event of acquittal or conviction, are likewise all set forth with particularity and definiteness. If the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of section 1 of the Sherman Act. [Emphasis added.]

In so holding, the court cited the American Naval Stores, MacAndrews & Forbes and Patterson cases, discussed supra, pp. 22-24, 25-26, 29-31.

The sufficiency of the indictment in charging various individual defendants with violations of the Sherman Act was also raised in a number of cases in which the defendants sought to prevent their removal to the Northern District of Ohio for trial. See United States ex rel. Hughes v. Gault, 271 U.S. 142; Fitzgerald v. United States, 6 Fd. 2d 156 (C.A. 1); Mechan v. United States, 11 F. 2d 847 (C.A. 6); United States ex rel. McGrath v. Mathues, 6 F. 2d

The court also cited the decisions upholding the Sherman Act indictments and convictions in *Boyle* v. *United States*, 259 Fed. 803 (C.A. 7; and *Belfi* v. *United States*, 259 Fed. 822 (C.A. 3). In both of those cases officers or agents of corporations appear to have been among the individual defendants indicted and convicted, but neither the indictments (returned in 1915 and 1917, respectively) nor the decisions mention Section 14 of the Clayton Act.

149 (E.D. Pa.); United States v. Moore, 7 F. 2d 734 (E.D. Ill.). In at least three of these cases the lower courts, in holding that the indictments sufficiently charged the individual defendants with participation in the alleged combination to support the. charge under the Sherman Act, also relied on the language of Section 14 of the Clayton Act. See United States ex rel. McGrath v. Mathues, supra, 6 F. 2d at 153; Fitzgerald v. United States, supra; and Meehan v. United States, supra, 11 F. 2d at The Meehan case is particularly interesting because there it was claimed that the defendant Howell had been described by the government, in evidence offered in support of its removal petition, as being only the assistant manager of his corporation while the company had other individuals functioning as président and general manager. But the court held that the indictment clearly charged that

the corporate defendant, in its unlawful acts, has been under the management, direction, and control of Howell, and that its elimination of competition by agreement and its allotment of exclusive customers, have been done under Howell's direction. This seems to us sufficient, either under the general principles involved or under Section 14 of the Clayton Act.

Those cases thus viewed Section 14 not as precluding, but as supporting, prosecution of corporate officials under the Sherman Act.

MAG.

This Court's opinion in *Hughes* v. *Gault, supra*, does not refer to Section 14 of the Clayton Act. But the government relied upon the lower court decisions mentioned above, which had cited Section 14 to sup-

port the sufficiency of the indictment. And the individual defendant Hughes, in contending that the indictment did not charge him with any crime under the Sherman Act, argued (271 U.S. at 145) that he "and the other natural persons named in the indictment are not charged with having authorized or done any act claiming to be illegal, but merely with having been officers or agents of the defendant corporations". This argument was, in substance, that the defendant was not, but should have been, charged in the language of Section 14. This Court summarily rejected this argument, holding (271 U.S. at 151):

We do not regard the attack upon the indictment as needing discussion. It has been upheld by a number of District Courts and by the Circuit Court of Appeals for the Sixth Circuit as sufficient for removal purposes. It alleges that the Iowa Malleable Iron Company under the charge of the relator was party to an agreement to eliminate competition in interstate trade and to fix excessive and noncompetitive prices, and that the company and the relator are engaged in a conspiracy in restraint of trade among the States. The relator is not left in doubt of the effort of the grand jury to present him as criminal under the Sherman Act.

2. Section 14 was not referred to in any subsequent case until the 1939 decision in *United States* v. *General Motors Corporation*, 26 F. Supp. 353 (N.D. Ind.), affirmed, 121 F. 2d 376 (C.A. 7), certiorari denied, 314 U.S. 618. The defendants in that case were General Motors Corporation, three of its subsidiary corporations and 19 individual defendants described in

the indictment as the "officers, employees, representatives and agents [known to the grand jury] who have been actively engaged in the management, direction, and control of the affairs and business of said corporations." These individual defendants were alleged to have conspired among themselves and with the corporate defendants to compel General Motors dealers to use a General Motors subsidiary to finance new automobile purchases. No single individual defendant was alleged, however, to have authorized, ordered or himself done any of the acts charged in the indictment. A general demurrer was filed alleging, among other things, that the indictment "fails to aver that the individual defendants authorized, ordered or did any of the acts or things constituting all or part of the criminal offenses sought to be charged thereby." It was also charged that the indictment was duplicitous in that it purported to charge more than one crime in one count.

In their brief in support of the demurrer the defendants contended (p. 76) that "the only manner in which the individual defendants can be held is under Section 14 of the Clayton Act." They argued that the language of the indictment was not sufficient under Section 14 of the Clayton Act, since the allegations failed to show that the individual defendants "performed a single act complained of or had anything whatever to do with the conduct alleged to have constituted the offense" (ibid.). But, they argued, if the allegations of the indictment were sufficient to charge any criminal offense against the individual

defendants, then that offense was under Section 14 of the Clayton Act and the indictment was duplications. In this connection they made the same arguments which the district court adopted in the present case. They contended (p. 79):

If the charge of the indictment is well laid against the individuals they are guilty not under the Sherman law but under the Clayton Act. The only allegations of the indictment referring to them describing them as officers, employees, representatives and agents of the corporate defendants and they are charged with no conduct engaged in otherwise. There is no suggestion that they entered into a conspiracy in their own right and they could not possibly be held on an indictment under the Sherman law. They are guilty under Section 14 of the Clayton Act or they are innocent. [Emphasis added.]

The district court summarily rejected this argument. It held (26 F. Supp. 355):

The indictment charges certain individual defendants with conspiring with the other defendants, including corporations in which they are officers. The fact that they are described as officers of the corporations does not mean that their conduct as such officers is complained of, but rather they are charged as individuals, together with the corporations, with violations of the Sherman Anti-Trust Act.

Appellee suggests (Motion to Affirm, p. 11) that the above language indicates that the district court was making a "clear distinction" between individuals who act on their own behalf, and are subject to the Sherman Act, and those who act in a representative capacity. In the context of the indictment and the motions and pleadings before the court, this position is untenable. There was not a word in the indictment which suggests that the General Motors officers named as defendants were acting on their own behalf. On the contrary, as indicated above, the only description of the officers was that they were "actively engaged in the management, direction, and control of the affairs and business of said corporation." Plainly, an officer of the General Motors Corporation engaged in a conspiracy to restrict the financing of General Motors cars did not have any personal stake in the conspiracy other than that of any corporate officer who naturally hopes that his activities on behalf of the corporation will ultimately redound to his benefit. In context, the statement that "their conduct as such officers" was not complained of "but rather they are charged as individuals" necessarily was a rejection of the individual defendants' argument that they could be tried only under Section 14. The court thus held that, since they were charged with individual participation in the alleged violations, they were properly charged under the Sherman Act.

3. The only other decision in a criminal case ²⁵ prior to the 1955 amendment to the Sherman Act (see pp.

²⁵ In United States v. Vehicular Parking Ltd., 54 F. Supp. 828 (D. Del.), a civil action was brought under Section 4 of the Sherman Act to enjoin a number of corporations and some of their officers from restraining commerce in the manufacture, distribution and sale of parking meters. One of the individual defendants alleged that the basic liability of such defendants had to be based upon Section 14 of the Clayton Act and that consequently they could be enjoined only under Section 15 of that Act (15 U.S.C. 25) and not under Section 4

63-67, infra) which refers to Section 14 is United States v. Atlantic Commission Company, 45 F. Supp. 187 (E.D.N.C., 1942). There several corporations and a number of their officers were indicted for a conspiracy to restrain and monopolize interstate commerce in potatoes, in violation of Section 1 and 2 of the Sherman Act. Paragraph 10 of the indictment, in accordance with the government's general practice since the time of the General Motors case, supra, charged that reference therein "to any act, deed or transaction on the part of any corporate defendant * * * shall be deemed to mean that the officers, agents, and employees of said corporation * * * ordered or did such act * * * for and on behalf of said corporation while actively engaged in the management, direction, and control of its affairs". The defendants alleged that this paragraph charged the individuals with conduct constituting a violation of Section 14, and that, since the indictment in terms charged them with violation of the Sherman Act, the count was duplicitous. The court rejected this argument, holding that the cited paragraph of the indictment was "merely descriptive" (45 F. Supp. at 194). It noted that if such descriptive language had not been included in the indictment "it might have been

of the Sherman Act. The court summarily rejected this contention. It stated that "the Clayton Act is not relied upon by the Government for its application in the instant case is superfluous," since the individual defendants had been charged under the Sherman Act and found to have had the necessary "participation" in the violation to justify a determination that they had violated the Sherman Act (see 54 F. Supp. at 840, n. 17).

contended that it was defective in not sufficiently charging participation in the conspiracy the 17 individual defendants named" (id. at 195). The court analyzed the legislative history of Section 14 of the Clayton Act and concluded ²⁸ (45 F. Supp. 194):

If the officer or agent is personally charged with participation in the conspiracy there is no necessity for the application of Section 14 of the Clayton Act. It is now well settled that officers and agents may be indicted with their corporation under the Sherman Act [citing the MacAndrews & Forbes, American Naval Stores, and General Motors cases, supra]. Inasmuch as officers and agents may be indicted with their corporation under the Sherman Act in a single count and since they are here so indicted, there is no necessity for an application of Section 14 of the Clayton Act. The corporate

²⁶ The court said that Section 14 had been passed "in order to create a method of punishing directors who took part in certain unlawful conduct under the anti-trust laws. Under Section 1 of the Sherman Act, a combination may be charged with entering into contracts to unlawfully restrain trade, apart from the offense of conspiracy. In some of the earlier cases under the anti-trust law, individual defendants sought to escape the application of the law on the ground that it was the corporate defendant that had entered into unlawful contracts and that its officers and agents could not be held unless they were shown to have participated in a conspiracy [citing the Union Pacific Coal Company case, supra, at p. 24]. Section 14 extended the scope of the personal responsibility for acts of corporations in violation of the anti-trust laws, but it did not create any new specific tests of its own by which violations of the anti-trust laws may be measured, as do some sections of the Clayton Act" (45 F. Supp. at 194).

defendants and the individuals named in the indictment are charged with a conspiracy among themselves to restrain trade and commerce and to monopolize trade and commerce in potatoes. The charge in its entirety is under the Sherman Act.

4. Thus, none of the cases construing criminal indictments of corporate officials under the antitrust laws since the adoption of the Clayton Act in any way suggests that Section 14 is the exclusive section under which defendants "having active management, direction, and control of the corporation" may be indicted. On the contrary, the National Malleable, General Motors and Atlantic Commission cases all expressly held that such corporate officials may be prosecuted under the Sherman Act.

The court below in the present case suggested (R. 38), however, that the "applicability" of Section 14 is demonstrated by this Court's reference to it in Hartford-Empire Co. v. United States, 323 U.S. 386. 434. That was a civil case in which the district court had found that a number of corporations and some of their officers had violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. This Court upheld the adjudication of violation by the corporations and a number of the "individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants * * * [and who] offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant" (pp. 433-434, see also pp. 401-402). It held, however, that "there is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants * * *" (p. 434). The Court then added (*ibid*.):

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That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal.

This brief reference to criminal liability under Section 14 of the Clayton Act " is neither a holding nor dictum that officials might not also be criminally prosecuted under the Sherman Act. For the Court expressly recognized that the individual defendants in that very case had been properly found to have violated the Sherman Act in the civil action there under review, and there is no basis for holding that the word "person" in Sections 1-3 of the Sherman Act applies to corporate officers in civil actions brought under Section 4 of the Sherman Act but not to crimi-

²⁸ United States v. Socony-Vacuum Oil Co., 23 F. Supp. 937, affirmed 310 U.S. 150.

^{29 [}Citing text of Clayton Act Section 14.]

The Court's reference to Section 14 may have stemmed from the citation of that provision in the government's brief as "confirmation * * * for the view that Congress wished to make it perfectly clear in this field that individual corporate officials were to be personally responsible for their own conduct" (see Brief for the Government on Reargument in Nos. 2-11, O.T. 1944, p. 39). But the brief made clear that Section 14 "did not embody any new principles, but merely insured that such persons will not escape criminal punishment" (id. at 38-39, footnote omitted).

nal actions. Moreover, the Socony-Vacuum case, which the Court cited directly prior to the reference to Section 14, was a case in which a number of corporate officers were indicted and convicted along with their corporations, solely for violation of the Sherman Act. Hartford-Empire thus casts no doubt upon the applicability of the Sherman Act to corporate officers.

C. THE ACTION OF CONGRESS IN 1955 IN INCREASING THE MAXIMUM FINE UNDER THE SHERMAN ACT CONFIRMS THAT CORPORATE OFFI-CIALS MAY BE PROSECUTED UNDER THAT ACT

In 1955 Congress increased the maximum fine for violating the Sherman Act from \$5,000 to \$50,000 (69 Stat. 282), but made no change in the \$5,000 maximum fine under Section 14 of the Clayton Act. The circumstances surrounding the enactment of this change further confirm the view that corporate officials may be prosecuted under the Sherman Act, and refute appellee's suggestion (Motion to Affirm, p. 16) that Congress intended to impose only the lower penalty under Section 14 for antitrust violations committed by corporate officials.

1. The 1955 Act had its origin in a 1950 proposal by the Department of Justice (H.R. 6679, 81st Cong., 2d Sess.) which would have increased the maximum fines under both Sections 1-3 of the Sherman Act and Section 14 of the Clayton Act to \$50,000.** During the

The Final Report of the Temporary National Economic Committee in 1941 had recommended that the maximum fine "under the antitrust laws" be increased to \$50,000 since "the courts are reluctant to punish a criminal violation by imprisonment" and the existing \$5,000 figure "is clearly inadequate as a deterrent

hearings on the bill, Assistant Attorney General Bergson was asked whether he believed that both the Sherman Act and Section 14 of the Clayton Act should have the same maximum penalty (Hearings Before Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary on H.R. 6679, 81st Cong., 2d Sess., p. 4). He responded (id. at pp. 4–5):

So far as the Department is concerned, we are primarily interested in section 1 of this bill [which raised the fine for violations of the Sherman Act]. Section 2 [which raised the fine for violation of Section 14 of the Clayton Act] would be applicable both to violations of the Sherman Act and the Clayton Act, and the Wilson Tariff Act so that so far as one portion of section 2 is concerned, it really is not necessary if you amend section 1.

I do not know that violations of the Wilson Tariff Act are of sufficient gravity for the maximum fine to be increased to \$50,000. So far as the Clayton Act is concerned, we are not urging the enactment of section 2. We would not object to it if in your wisdom, you thought that it should be raised to \$50,000. We think that raising the penalty under the Sherman Act * * * [w]ould accomplish the purposes that we would like to see accomplished.

Representative Patman similarly stated during the hearing that no increase in the penalties for violation

to businessmen or to groups of businessmen whose incomes are in the millions * * *". See, S. Doc. No. 35, 77th Cong., 1st Sess., p. 40. See also Monopolistic and Unfair Trade Practices, Report of House Select Committee on Small Business, 80th Cong., 2d Sess. (1948), p. 24.

of Section 14 was required (id. at 15-16). The bill, as reported out, covered only the Sherman Act. In the floor debates Congressman Celler explained that "[w]e considered increasing the penalties of the Clayton Act, the Federal Trade Commission Act, and the other kindred acts, like the Robinson-Patman Act, but the Department of Justice seemed to be of the opinion it would be sufficient merely to increase the penalties of the Sherman Act, since most of the cases involving antitrust violations are brought under the Sherman Act; therefore, we deemed it advisable not to go too far * * *." 96 Cong. Rec. 8071.

The bill passed the House, but died in the Senate. A similar bill (H.R. 2237) in the 83d Congress, also limited to the Sherman Act, again passed the House, but not the Senate. In the 84th Congress, however, a bill (H.R. 3659) which increased the maximum fines for violation of the Sherman Act to \$50,000 was finally adopted. Just prior to enactment of this bill, the 1955 Report of the Attorney General's Committee to Study the Antitrust Laws recommended an increase in Sherman Act maximum fines from \$5,000 to \$10,000; it did not mention Section 14 in this connection.

The hearings and debates on the bill in the 81st Congress, and the House and Senate Reports and the debates on the bill which was finally adopted in 1955, were primarily concerned with the necessity of providing a penalty that would be sufficiently severe to be an effective deterrent upon corporate antitrust violators. But while the reports and debates do not

specifically state that corporate officials (as distinguished from their corporations) would also be subject to the higher fine, they leave no doubt that Congress intended to, and did, increase the penalties for such individuals. See H. Rep. No. 1906, 81st Cong., 2d Sess., pp. 4-5; H. Rep. No. 70, 84th Cong., 1st Sess., pp. 1, 3-5; S. Rep. No. 618, 84th Cong., 1st Sess., pp. 2, 3; 96 Cong. Rec. 8071, 8076; 101 Cong. Rec. 3942-3945, 3947. For example, the House Committee Report on the 1955 bill pointed out (H. Rep. No. 70, 84th Cong., 1st Sess., p. 3) that since "[j]udges have likewise been reluctant to send individuals to jail for Sherman Act violations," usually "the only penalty which is imposed under the act is a fine of not more than \$5,000. This, the committee feels, is grossly inadequate. The purpose of the present bill is to authorize the more flexible and effective punishment of a fine up to \$50,000."

2. This history makes it clear that the only reason Congress did not increase the maximum fine under Section 14 was because it believed that such an increase was unnecessary, i.e., that increasing the fine under the Sherman Act would provide an adequate deterrent to both corporations and their officials. This was the substance of Assistant Attorney General Bergson's 1950 statement that "raising the penalty under the Sherman Act * * * [w]ould accomplish the purposes that we would like to see accomplished." For at that time the Department of Justice had prosecuted literally hundreds of corporate officials under the Sherman Act, and had never found it necessary to prosecute under Section 14.

There is nothing in the legislative history that suggests that Congress intended to limit the higher fine to corporations (and to partners and individual proprietors of small businesses), and not to cover the corporate officers who are responsible for the corporate violations. Indeed, in view of the clear purpose of Congress to make the criminal penalties under the antitrust laws a more effective deterrent, the failure of Congress to change the fine under Section 14 is the clearest evidence that Congress believed that the higher Sherman Act fines would be the standard of punishment for corporate officials as well as their companies. If Congress had thought that such officials could be prosecuted only under Section 14, it is inconceivable that it would not also have increased the \$5,000 fine under that section—an amount which the House Committee considered "grossly inadequate" (H. Rep. No. 70, 84th Cong., 1st Sess., p. 3).

CONCLUSION

The order of the district court dismissing counts 11 and 12 of the indictment as to the appellee should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.

RICHARD A. SOLOMON,
PATRICK M. RYAN,
Attorneys.

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APPENDIX A

-	Name of case	Date indictment returned	Section of Sherman Act under which drawn	Defendants indicted	Disposition of case
1.	United States v. Joseph B. Greenhut (D. Mass.).	Feb. 23, 1892	2 1 and 2	Officers and directors	1 indictment dismissed on demurrer (50 Fed. 469). Other indictment nolle prossed.
2.	United States v. John H. Patterson (D. Mass.).	July 2, 1892; Oct. 5, 1892 (2 indict- ments).	1 and 2	Officers, directors, and agents	On demurrer indictment was sustained in part (55 Fed. 605; 59 Fed. 280). A nolle prosequi was then entered (D & J 680).
3.	United States v. James M. Moore (D. Utah).	Nov. 4, 1895	3	2 corporations, 2 corporate agents (various other individuals)	Defendants convicted and fined (D & J 683); reversed on appeal on jurisdictional grounds (85 Fed. 465).
4.	United States v. Armour & Co. (N.D. III.).	July 1, 1905	1 and 2	Corporations and the officers and directors.	Individual defendants were dismissed on plea of immunity (142 Fed. 808). Nolle presequi entered as to corporate defendants (D & J 687).
5.	United States v. Virginia-Car- olina Chemical Co. (M.D. Tenn.).	May 25, 1906	3	31 corporations, 25 individual de- fendants (described as "officers, managers, agents and attor- neys").	Demurrers to indictment denied (163 Fed. 66, 70) but ples in abatement sustained (163 Fed. at 76). Remaining defendants dismissed at Government's request (D & J 689).
6.	United States v. Mac Andrews & Forbes Co. (8.D.N.Y.).	June 18, 1906	1 and 2	2 corporations, 2 presidents	Demurrers to indictment overruled (149 Fed. 823); individuals were acquitted and corporations convicted (149 Fed. 836).
7.	United States v. American Ice Co. (Sup. Ct. D.C.).	July 12, 1906	3	2 corporations, 4 officers	Nolle prosequi entered (D & J 692).
8.	United States v. De Mund Lumber Co. (D. Ariz.).	Oct. 23, 1906	3	3 corporations, 2 officers	Directed verdict for 2 of the corporations (D & J 701, 702); pleas in bar of 2 individual defendants were sustained; indictment dismissed as to 3d corporate defendant (D & J 700, 703).
.0.	United States v. Phoenix Wholesale Meat Co. (D. Ariz.).	Oct. 23, 1906	3	1 corporation, its president and principal stockholder.	Indictment dismissed as to principal stockholder because he testified for Government; corporation was acquitted; president was convicted, fined \$1,000 (D & J 705); con- viction was affirmed by Supreme Court of the Territory of Arizona (95 Pac. 85).

APPENDIX A—Continued

Name of case	Date indictment returned	Section of Sherman Act under which drawn	Defendants indicted	Disposition of case
10. United States v. Shotter Co. (S.D. Ga.).	Feb. 11, 1907	1	7 corporations, 9 corporate officers and employees.	4 corporations and 2 individuals pleaded guilty and were fined \$5,000 each (D & J 707, 708); nolle prosequis entered as to remaining defendants.
11. United States v. National Umbrella Frame Co. (E.D. Pa.).	July 1, 1907	1	3 corporations, 1 individual pro- prietor, 4 corporate agents.	Corporations pleaded guilty, and were fined \$1,000 each (D & J 715); indictment dismissed as to remaining defendants.
 United States v. Union Pacific Coal Co. (D. Utah). 	Nov. 20, 1907	1	3 corporations, 2 corporate agents	Defendants were found guilty and fined (D & J 720). On appeal, convictions were reversed on ground that no conspiracy was proved (173 Fed. 737).
3. United States v. American Naval Stores (S.D. Ga.).	Apr. 11, 1908	1 and 2	2 corporations, 6 corporate officers.	Demurrer to the indictment overruled (186 Fed. \$92). Solution individual defendants convicted on May 10, 1909 (D & J 729); conviction affirmed (186 Fed. 489) but reversed for errors in charge to jury (229 U.S. 373); retrial resulted in acquittal (D & J 732).
S. United States v. American Sugar Refining Co. (S.D.N.Y.).	July 1, 1909	1 and 2	1 corporation and its directors and agents.	Circuit court sustained plea of statute of limitations (17: Fed. 823) but the Supreme Court reversed (218 U.S. 601) Trial resulted in hung jury and indictment was noise prossed (D & J 735).
5. United States v. Albia Box & Paper Co. (S.D.N.Y.).	Dec. 7, 1909	1	39 corporations, 52 officers and agents.	32 corporations pleaded guilty and were fined. Noll prosequis were entered for all remaining defendants (D & J 736).
3. United States v. Imperial Window Glass Co. (W.D. Pa.).	Apr. 7, 1910	1 and 2	1 corporation, 15 officers and agents.	Demurrers were overruled; pleas of nolo contendere accepted and the corporation was fined \$2,500; individual defendants \$500 each (D & J 748).
. United States v. Cudahy Pack- ing Co. (S.D. Ga.).	Apr. 30, 1910	1	5 corporations, 3 corporate agents (branch house managers).	Demurrer to indictment sustained as to second count nolle prosequi was entered on 1st count (D & J 750).
3. United States v. Louis Swift (N.D. III.).	Sept. 13, 1910	1	10 individuals "principal owners and the only real managers of their corporations."	Pleas in bar denied (186 Fed. 1002); demurrers to indict ment overruled (188 Fed. 92); defendants acquitted at trial (D & J 752).

19.	United States v. Standard San- itary Mfg. Co. (E.D. Mich.).	Dec. 6, 1910	1	16 corporations, 34 corporat: officers.	1
20.	United States v. D. V. Puring- ton (N.D. III.).	Sept. 14, 1910	1	3 corporations, 4 corporate officers	r
21.	United States v. William C. Geer (S.D.N.Y.).	Apr. 28, 1911	1	19 individuals (15 corporate of- ficers, 1 corporate agent, 3 part- ners).	I
22.	United States v. Isaac Whiting (D. Mass.).	May 26, 1911 (2 indictments).	1 1 and 2	7 individuals who were "the principal owners and actual and real managers" of various corporations.	I
23.	United States v. William P. Palmer (S.D.N.Y.).	June 29, 1911	1 and 2	26 corporate officers and agents (including 2 salesmen).	I
24.	United States v. J. B. Pearce (N.D. Ohio).	July 19, 1911	1	8 officers and directors	I
25.	United States v. Hunter Milling Co. (W.D. Okla).	Sept. 10, 1911	1	2 corporations, 1 corporate officer	I
26.	United States v. Winslow (D. Mass.).	Sept. 19, 1911 (2 indictments).	1 and 2	6 directors and stockholders	1
- 27.	United States v. New Depar- ture Mfg. Co. (W.D.N.Y.).	Jan. 8, 1912	1 and 2	6 corporations, 18 individuals (16 of them officers and agents of the corporate defendants).	1
28.	United States v. North Pacific Wharves & Trading Co. (D. Alaska).	Feb. 12, 1912	1 and 2	4 corporations, 7 officers and agents.	1
29.	United States v. Pacific & Arctic Ry. (D. Alaska).	Feb. 12, 1912	1 and 2	1 corporation, 5 officers and agents.	1
30.	United States v. North Pacific Wharves & Trading Co. (D.	Feb. 12, 1912	1 and 2	4 corporations, 9 officers and agents.	1
31.	United States v. Pacific & Aretic Ry. (D. Alaska).	Feb. 13, 1912	1 and 2	5 corporations, 13 officers and agents.	1

- Immunity pleas denied (defendants had testified in previous equity suit). At trial defendants were convicted and 13 corporations and 14 individuals were fined (D & J 755).
- Demurrers to indictment overruled; nolle prosequi entered (D & J 757).
- Demurrer to indictment overruled; 12 defendants were nolle prossed; 7 pleaded nolo contendere and were fined (D & J 758).
- Demurrer to 1st indictment was sustained but overruled as to 1st count of 2d indictment (212 Fed. 448); 1 defendant pleaded nolo contendere and was fined \$500 and indictment was dismissed as to remaining defendants.
- Defendants pleaded nolo contendere and were fined (D & J 760).
- Demurrer overruled; acquittal at trial (D & J 777).
- Demurrer overruled; convicted at trial and fined (D & J 779).
- Demurrer to 1st indictment and demurrer to 1 count of 2d indictment was sustained (195 Fed. 578); Supreme Court affirmed (227 U.S. 202). 2d indictment was nolle prossed.
- Plea in abatement (195 Fed. 778) and demurrer overruled (204 Fed. 107). Nolle prosequi entered as to 6 of the individual defendants. The remaining defendants pleaded guilty and were fined (D & J 785).
- Demurrer to indictment sustained (D & J 787).

Plea of statute of limitations was sustained (D & J 791).

Demurrer to indictment overruled; at trial, indictment was dismissed as to the individual defendants, corporate defendants pleaded guilty and were fined (D & J 788-89). Demurrer to indictment sustained in part but reversed by Supreme Court (228 U.S. 87). Indictment dismissed as to the individual defendants; corporate defendants pleaded guilty and were fined (D & J 792-93).

APPENDIX A—Continued

Name of case	Date indictment returned	Section of Sherman Act under which drawn	Defendants indicted	Disposition of case
32. United States v. John H. Fatterson (S.D. Ohio).	Peb. 22, 1912	1 and 2	30 officers and agents of National Cash Register Co. (president, general manager, assistant gen- eral manager, secretary, treas- urer, director, 6 district man- agers, 12 managers, 3 agents, attorney and law clerk).	Demurrer to indictment overruled (201 Fed. 697). Trial resulted in conviction of 29 defendants and 27 were given jail sentences (D & J 795); court of appeals reversed on March 13, 1915 (222 Fed. 599) and indictment was nolle pressed (D & J 798).
33. United States v. Julius F. Miller (E.D.N.Y.).	Apr. 2, 1912	1	3 corporate officers	Demurrer to indictment sustained and indictment dis- missed (D & J 799).
34. United States v. Consolidated Rendering Co. (D. Mass.).	Oct. 31, 1912 (2 indictments).	2	1 corporation, 4 officers and direc- tors.	Noile presequi entered as to the individual defendants; corporation pleaded noile contenders and was fined (D & J 754).
35. United States v. Charles S. Mellen (8.D.N.Y.).	Dec. 23, 1912	1	3 officers and directors	Indictment was noile prossed.
36. United States v. Hippen (W.D. Okia.).	June 25, 1913	1	3 corporations, 10 corporate officers.	Demurrer to indictment sustained (D & J 805).
37. United States v. American Wringer Co. (W.D. Penn.).	May 22, 1914	1	2 corporations, 8 officers and eigents.	Defendants pleaded note contenders and were fined (D & J 822).
38. United States v. Booth Fisheries (W.D. Wash.).	July 20, 1914	1	6 corporations, 5 officers and agents.	Indictment was dismissed as to the individual defendants and one corporation. Rest pleaded noto contenders and were fined.
39. United States v. Western Cun- tuloupe Exchange (N.D. Ill.).	Aug. 7, 1914	1 and 2	7 corporations, 13 corporate officers (15 other individuals).	Indictment was dismissed at the Government's request on Nov. 9, 1918, and a consent decree entered to a civil complaint filed that same day.
40. United States v. Daniel P. Collins (Sup. Ct. D.C.).	Sept. 14, 1914	3	31 individuals (including 11 cor- porate officers).	Demurrers to indictment overruled (D & J 825); 2 defend- ants were noile prossed and rest pleaded noic contenders (D & J 828-27).

APPENDIX B

EXCERPTS FROM CONGRESSIONAL DEBATES ON SECTION 14 OF THE CLAYTON ACT

Mr. Floyd of Arkansas. * * * The purpose we had was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered, or did the thing prohibited should be guilty. Under the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty; but in the enforcement of the criminal provisions of the Sherman law, experience has demonstrated that both juries and courts are slow to convict men who have simply done acts authorized or ordered by some officers of the concern higher up, and the words "authorized" and "ordered" were introduced to reach the real offenders, the men who caused the things to be done; and if the language is susceptible of any ambiguity and is not clear, we desire to make it clear [51 Cong. Rec. 9609].

Mr. FLOYD of Arkansas. * * * Under the existing law the corporation may be convicted. True, * * * the corporation can only violate the law through the acts of its agents, officers, or employees; but we are proposing and seeking by this provision to visit guilt upon the real offenders.

Now, under the existing law, the man who does the act which constitutes a violation of the law can be punished as an individual, just as the corporation can be punished on account of the unlawful act of its

agents or officers. But we propose by this provision to hold as responsible under the criminal statutes the man who authorizes or orders wrongful things to be done. In other words, we are seeking to reach the directors and the high officers of these corporations who authorize or direct their employees to do acts which constitute violations of the antitrust laws * * * [51 Cong. Rec. 9676].

Mr. Volstead. It seems to me that this is open to the same objection as the original section. While it is true that the original section requires a conviction, this section requires first a showing that the corporation is guilty, because until there is proof of guilt the court could not say that the corporation is guilty. Nearly all our antitrust suits are brought as equity suits, because it is of very little use to bring a criminal suit against a corporation. Consequently, this will practically shield the persons participating in the guilty act by making their conviction depend upon the conviction of the corporation, which is not likely to take place.

Mr. Floyd of Arkansas. I will say to the gentleman from Minnesota that we do not make the conviction of an individual conditional upon the guilt of the corporation. We provide that where the corporation is guilty it shall be deemed the offense of the officers, directors, or agents authorizing, ordering, or doing the thing prohibited, but they may be guilty independently of that, and if guilty may be tried and convicted without reference to the guilt of the corporation [51 Cong. Rec. 9677].

Mr. Floyd of Arkansas. I desire to be perfectly frank. I desire to state that our idea was to so write the law that when one of those corporations had been

found guilty that the parties who were responsible for that violation of law could be punished for the acts that constituted that violation of law as individuals.

If they commit acts held to be unlawful they can be punished now, as I suggest, but we can not reach the men who are really responsible, the men who authorize and direct the acts to be done. They shelter themselves under technical provisions of the law, and some subordinate or minor employee of the corporation, some man who is paid \$5 a day for his services, as in the sugar case, is convicted and sent to the penitentiary, while the rich director or officer who sits back in his room and directs the employee to do the things prohibited and gives him \$5 a week extra to violate the law is never touched and never convicted. Our purpose is certainly good, and if the House can help us in perfecting the amendment we will welcome their assistance. But we regard this section as important. If the individual now violates the Sherman law he can be convicted independently of the conviction of the corporation, but we seek to impute to the individual in this provision the guilt of the corporation, and subject him to punishment, but in all fairness we do not make him guilty without further trial. We provide he shall be indicted, tried, and proceeded against in the usual way. That is the purpose of this section.

Mr. Towner. Mr. Chairman, will the gentleman yield for a question?

Mr. FLOYD of Arkansas, Yes.

Mr. Towner. Would it not be absolutely necessary in any prosecution against any individual to allege in the indictment that the corporation had been convicted, and would not the indictment be subject to demurrer unless the allegation was made in the indictment?

Mr. FLOYD of Arkansas. Under this particular section I will state to the gentleman that that might be true, but still that very fact would enable us to reach a class of cases that we can not now reach under existing law. But if the individual independently had violated the Sherman law and was guilty of violation of it in any way as an individual, he could be convicted without ever convicting the corporation, while if the guilt of the corporation is imputed to his acts as an individual, and those acts as an individual would not constitute a violation of the Sherman law, then under this provision, if written into the law, such acts would become unlawful and the adoption of this provision would bring these forbidden acts within the purview of the law and make the director, officer, or agent guilty, the guilt of the corporation being imputed to him.

Mr. Towner. But the injurious effect would be that you never could convict any individual without

previously convicting the corporation.

Mr. Floyd of Arkansas. The purpose of this section is to enable the Government, when it has convicted the corporation, to reach those responsible officers who have been proven in the trial to be guilty of a violation of law by presentment of an indictment and trial. It authorizes their conviction not only for acts done but for acts authorized or ordered to be done, and gentlemen who think this would be any protection to the corporation or its directors, officers, or agents and would give them any leniency entirely misconceives the purpose of this provision.

Mr. Volstead. Mr. Chairman, will the gentlemen

yield?

Mr. FLOYD of Arkansas. Yes.

Mr. Volstead. Is not this true, that the Government very seldom indicts a corporation? It brings a suit in equity, while this compels a double action if

you seek to hold the individual criminally. It compels first a criminal action against the corporation and then perhaps a suit in equity, while under the law as it now stands you can indict and convict the individual without paying any attention to the corporation, so far as any criminal procedure is concerned, and you can at the same time pursue your remedy in equity.

Mr. FLOYD of Arkansas. In answer to the gentleman's question I will say this: That this in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law, he can be indicted independently of this provision: but the series of acts which constitute a violation of the Sherman law are not crimes within themselves under existing law. If we adopt this provision, whenever a corporation is convicted of violation of the Sherman law and the guilt of the corporation is imputed to the individual officers or agents of the corporation, then acts done in furtherance of and unlawful combination become within this provision specifically indictable offenses that are not indictable now; and the result would be that you could indict and convict the officers and agents that were responsible for that violation on a state of facts on which they will go free now, no matter how often you indict them, because those isolated acts are not sufficient in themselves to constitute a violation of the Sherman Act [51 Cong. Rec. 9678-79].

Mr. Barkley. Is not the real object of the section that there shall be unlimited power of prosecution, both of individuals and corporations, but the additional power that when the corporation itself is convicted the officers and directors shall also be guilty of the thing which is denounced by the law.

Mr. Lenroot. Not denounced by the law, but where they have contributed in any degree to the violation, althought their act, standing alone, might not be a violation.

Mr. Barkley. The amendment covers this ground specifically.

Mr. Lenroot. My amendment is to strike out the balance of the section and insert, so that it will provide that whenever the corporation shall violate any of the provisions of the antitrust laws—not leaving it to be determined in a criminal action; it may be determined in an action in equity—such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized or ordered or done any of the acts constituting in whole or in part any such violations. Those acts standing alone might be absolutely innocent, but if they have contributed in whole or in part to the violation by the corporation, they make the party guilty. * * * [51 Cong. Rec. 9681.]

Mr. TALCOTT of New York. Is that not true that the Sherman Act provides criminal penalties?

Mr. WEBB. It does.

Mr. TALCOTT of New York. And in a great many of the cases referred to in this act, does it not?

Mr. Webb. I do not know that I understand my friend.

Mr. TALCOTT of New York. I mean in regard to a great many of the acts referred to in this law.

Mr. Webb. If the acts complained of restrain trade, or attempt to monopolize, then the persons guilty of them subject themselves to criminal penalties under the Sherman law. This bill which we are now considering preserves that right and makes guilt personal, and that is the only way in which we have

undertaken to amend the Sherman antitrust law at all—that is, in making guilt personal [51 Cong. Rec. 16275].

Mr. Floyd. * * * Keep in mind that we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have, on the contrary, supplemented the penal provisions of the Sherman law and of other existing antitrust laws. Section 12 of the House bill, now section 14 of this bill, makes guilt personal—and it was retained by the Senate, retained by the conferees, and is in the bill reported by the conferees in the exact wording in which it passed the House. (51 Cong. Rec. 16317.)

Mr. Floyd. * * * The original personal-guilt clause of the House bill was embodied in section 12. It was adopted and was restored in committee, and it is now found in section 14 of the bill. It is in the exact words in which the provision passed this House. It will be remembered there was considerable controversy and debate over it, and I believe the final draft of the amendment adopted was made by the distinguished gentleman from Wisconsin [Mr. Lenroot]. The House adopted it, after a debate of several hours, with apparent satisfaction. The Senate amended it. The conferees insisted upon its restoration to the form in which it passed the House, and the Senate conferees yielded, and the personal guilt clause of the original bill is in this bill and applies to all of the penal sections of the antitrust laws.

The gentleman from Minnesota [Mr. Volstead] says that it may repeal the Sherman law. It is the exact penalty provided for in the Sherman law, but it goes further than the courts have ever gone in convicting officers, directors, or agents for violation of

the Sherman law. It provides that whenever a corporation shall be guilty of violating the penal provisions of the antitrust laws, the offense shall be deemed also the offense of the individual directors, officers, or agents of the corporation who have directed, ordered, or done, in whole or in part, any of the things that constitute a part of that violation. Is not that broader than the original law? In other words, under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation, then he may be convicted as an individual [51 Cong. Rec. 16320].

APPENDIX C

United States District Court for the District of Columbia

Cr. No. 527-61

UNITED STATES OF AMERICA

v.

NORTH AMERICAN VAN LINES, INC.; AERO MAYFLOWER TRANSIT COMPANY, INC.; ALLIED VAN LINES, INC.; UNITED VAN LINES, INC.; JAMES D. EDGETT; PAUL CLARKE; JOHN SLOAN SMITH; EMMETT J. FLAVIN; LOREN A. LARIMORE; HOUSEHOLD GOODS CARRIERS' BUREAU.

[Filed January 29, 1962. HARRY M. HULL, Clerk.]

Memorandum Opinion

BURNITA SHELTON MATTHEWS, District Judge.

The two count indictment in this case charges four corporations, five of their officers and a trade association with violating Sections 1 and 3 of the Sherman Act, 15 U.S.C.A. 1 and 3.1 In general the charge in

¹ These sections provide in pertinent part:

[&]quot;Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor * * *." (Section 1.)

[&]quot;Every contract, combination * * * or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory

each count is that the defendants engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in the transportation of household goods. Count 1 relates to trade and commerce specified in Section 1 of the Sherman Act while Count 2 relates to trade and commerce specified in Section 3 of that Act.

Now before the court is a motion by the individual defendants to dismiss the indictment as to them. In support of their motion they assert that the indictment does not allege any acts done by them other than as representatives of their corporations in their capacity as corporate officers, and that acts authorized, ordered or done by officers of corporations in such capacity cannot constitute offenses by such corporate officers under Sections 1 and 3 of the Sherman Act but are covered only under Section 14 of the Clayton Act, 15 U.S.C.A. 24, which provides:

Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor * * *.

Upon turning to the penalties prescribed under the mentioned provisions of the Sherman and Clayton Acts the significance of the issue here raised is manifest. Originally these penalties were identical, being a fine not exceeding \$5,000 or imprisonment not ex-

tory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *." (Section 3.)

ceeding one year, or both. However, in 1955 Congress changed Sections 1 and 3 of the Sherman Act by fixing the fine at not exceeding \$50,000 ° but left untouched the fine of not exceeding \$5,000 under Section 14 of the Clayton Act.

Opposing the motion of the individual defendants to dismiss, the Government maintains that these defendants are charged in a dual capacity, that is, as representatives of their corporation in their corporate capacity and also as individuals in a personal capacity. The portion of the indictment labeled Offense Charged in respect of each count does not allege any capacity in which the individuals acted. Among introductory allegations in the indictment labeled The Defendants there appears a statement that each individual defendant is or has been an employee or officer of a specified corporate defendant and also a statement that acts charged in the indictment "to have been done by each defendant corporation were authorized, ordered or done by the officers, agents, employees or representatives of such defendants, including, but not limited to, those individuals named as defendants * * *, while actively engaged in the management, direction or control of its affairs." Although the quoted language may show that the individual defendants are being charged, at least in part, in their representative capacity, it cannot be said to limit the charges against them to acts so performed. But apparently it is this language upon which the individual defendants ground their claim that they have been charged only in their capacity as corporate officers.

It is suggested by the individual defendants that if the court cannot determine from the face of the indictment that they are charged only in their capacity as corporate officers then the court should order

² Chapter 281, 69 Stat. 282.

the United States to furnish a bill of particulars stating whether any of them is claimed to have authorized, ordered or done any of the acts alleged other than in his capacity as a corporate officer, and, if so, stating with particularity each such act and the capacity in which his claimed so to have acted. Bills of particulars and statements of the parties, however, should not be considered as a part of the indictment or as a substitute therefor or amendment thereto, and can neither weaken the indictment nor change the crime charged. And in passing upon a motion to dismiss, the allegations of the indictment must be accepted by the court as written.

Without qualification the indictment here charges each of the defendants with engaging in a combination and conspiracy in violation of Sections 1 and 3 of the Sherman Act. It is not drawn so as to limit the charges against these defendants to acts committed solely in their capacity as corporate officers, and for purposes of this motion the court accepts the indictment as written.

As already stated, the defendants here argue that Section 14 of the Clayton Act affords the Government its sole statutory basis for prosecuting them. Section 1 and Section 3 of the Sherman Act each describe those coming within its provisions as "Every person" doing the proscribed acts while Section 14 of the Clayton Act deals specifically with individual corporate officers by declaring that whenever a corpo-

⁸ United States v. Comyns, 1919, 248 U.S. 349; Krause v. United States, 8th Cir., 1920, 267 F. 183; United States v. Dierker, D.C. Pa., 1958, 164 F. Supp. 304; United States v. Pennell, D.C. Cal., 1956, 144 F. Supp. 320; United States v. Lefkoff, D.C. Tenn., 1953, 113 F. Supp. 551; United States v. Johnson, D.C. Del., 1944, 53 F. Supp. 167.

⁴ United States v. Latimore, D.C.D.C., 1955, 127 F. Supp. 405, affirmed 232 F. 2d 334, 98 U.S. App. D.C. 77.

ration shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual officers, directors or agents of such corporation who shall have authorized, ordered or done any of the acts constituting in whole or in part such violation. In effect the argument of the defendants is that if corporate officers acting in their representative capacity ever were within Sections 1 and 3 of the Sherman Act then they were lifted out of these sections when Section 14 of the Clayton Act was adopted.

But Section 14 of the Clayton Act must be viewed in the light of its purpose and setting. "The Clayton Act, as its title and the history of its enactment disclose, was intended to supplement the purpose and effect of other antitrust legislation, principally the Sherman Act of 1890." Standard Co. v. Magrane-Houston Co., 1921, 258 U.S. 346, 355. Section 14 supplemented the existing laws by providing a specific statute under which a corporate officer, agent, or director could be held personally liable for contributing to a violation of an antitrust penal provision by his corporation even though his contribution, standing alone, might not be such a violation." The legislative

⁵ The Clayton Act is entitled "An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes." [Emphasis supplied.] 38 Stat. 730.

⁶ One type of situation which Section 14 was designed to meet is described in *United States* v. Atlantic Commission Co., D.C.N.C., 1942, 45 Supp. 187, 194 as follows:

[&]quot;Under Section 1 of the Sherman Act, a combination may be charged with entering into contracts to unlawfully restrain trade, apart from the offense of conspiracy. In some of the earlier cases under the antitrust law, individual defendants sought to escape the application of the law on the ground that it was the corporate defendant that had entered into unlawful contracts and that its officers and agents could not be held unless they were shown to have participated in a conspiracy."

history of the Clayton Act makes it abundantly clear, however, that Congress did not intend by this section to supplant the penal provisions of the Sherman Act, or to relieve from liability any violators of such provisions. Representative Floyd, a member of the Judiciary Committee and floor leader in charge of Section 14, pointed this out in the debate on that section, saying:

* * I will say this: That this in no way affects the procedure under existing law, either criminal or civil. If an individual is guilty of violating the Sherman law, he can be indicted independently of this provision; * * . [Emphasis supplied.] 51 Cong. Rec. 9679.

In explaining the conference report on the proposed Clayton Act to the House of Representatives Mr. Floyd further stated:

Keep in mind that we have not disturbed the text of the Sherman law. We have not disturbed the penal provisions in the existing antitrust laws, including the Sherman law. We have on the contrary, supplemented the penal provisions of the Sherman law and of other existing antitrust laws. [Emphasis supplied.] 51 Cong. Rec. 16317.

Thereafter in debate Representative Floyd also said of Section 14:

It * * * goes further than the courts have ever gone in convicting officers, directors, or agents for violation of the Sherman law. It provides that whenever a corporation shall be guilty of violating the penal provisions of the antitrust

Similarly, if a corporate officer were charged with monopolizing under Section 2 of the Sherman Act, 15 U.S.C.A. 2, he might claim that only the corporation could be guilty of monopolizing and that he could not be held unless it were shown that he had engaged in a conspiracy to monopolize.

laws, the offense shall be deemed also the offense of the individual directors, officers, or agents of the corporation who have directed, ordered, or done, in whole or in part, any of the things that constitute a part of that viola-Is not that broader than the original law? In other words, under the Sherman law as it is now written you can convict an officer for violation of its provisions, but his acts must constitute the whole offense, or he must be a conspirator, and come within the rules of law governing conspiracies, but under this provision if he does any of the acts which constitute in whole or in part that violation, then he may be convicted as an individual. [Emphasis supplied.] 51 Cong. Rec. 16320.

Senator Chilton, a member of the Senate Judiciary Committee which worked on the proposed law, said during the Senate debate:

Mr. President, the first and chief proposition that the people laid down to us and that all of us have agreed upon is that we will not touch a line or a section of the Sherman Antitrust law. It must remain as it is. We had to consider certain things which have never of themselves been held to be a violation of that law, but which in connection with other things have been held to be a part of a conspiracy to violate it. [Emphasis supplied.] 51 Cong. Rec. 14327.

Several members of Congress stated in debate that Section 14 was not necessary and that anything this section was intended to accomplish could be done under the Sherman Act. For example, see the remarks of Representative Nelson, 51 Cong. Rec. 9169, Representative Green, 51 Cong. Rec. 9201, and Senator Shields, 51 Cong. Rec. 14214, 14225. The suggestion was made by Representative Volstead that this section would add nothing to the law and was simply being

put in "for buncombe" because of speeches and promises made during a political campaign. 51 Cong. Rec. 9079-9080. Opponents of the section expressed fear that it might weaken rather than strengthen the application of criminal penalties to corporate officers. This fear was based on the idea (1) that trial of an officer under Section 14 might require more evidence than under the Sherman Act, since under Section 14 a violation by the corporation as well as the individual defendant would have to be proved, 51 Cong. Rec. 9596, and (2) that this section was not as broad in its coverage as the general aiding and abetting law which previously had been used to convict corporate officers and agents where they had not themselves directly violated the Sherman law but had aided or abetted such a violation. 51 Cong. Rec. 9681. But certainly no reasonable basis can be found in the legislative history for the contention that by Section 14 Congress intended or desired to limit in any way the application of any part of the Sherman Act. To the contrary, this history makes it plain that it was the purpose of Congress to maintain all the penal provisions of the Sherman Act in undiminished force.

Prior to the passage of the Clayton Act it had been held that corporate officers might be charged with conspiracy, as they are in the instant case, in direct violation of the Sherman Act. And since the passage

^{&#}x27; Now 18 U.S.C.A. 2.

^{*}United States v. MacAndrews & Forbes Co., Cir. Ct., N.Y., 1906, 149 F. 823; Patterson v. United States, 6th Cir., 1915, 222 F. 599; United States v. Swift, D.C. Ill., 1911, 188 F. 92. See also Nash v. United States, 1913, 229 U.S. 373.

of the Clayton Act it has also been so held. As was said in *United States* v. Atlantic Commission Co., D.C.N.C., 1942, 45 Supp. 187, 194:

If the officer or agent is personally charged with participation in the conspiracy there is no necessity for the application of Section 14 of the Clayton Act. It is now well settled that officers and agents may be indicted with their corporation under the Sherman Inasmuch as officers and agents may be indicted with their corporation under the Sherman Act * * * and since they are here so indicted there is no necessity for the application of Section 14 of the Clayton Act. corporate defendants and the individuals named in the indictment are charged with a conspiracy among themselves to restrain trade and commerce * * *. The charge in its entirety is under the Sherman Act.

The concept of the individual defendants that Sections 1 and 3 of the Sherman Act apply to individuals acting in their individual capacity but not to corporate officers acting in their corporate capacity is one to which this court cannot subscribe. Under the terms of Sections 1 and 3 of the Sherman Act every person who engages in the prohibited combination or conspiracy is included. These sections do not make a distinction between alleged conspirators who were corporate officers acting in a representative capacity on the one hand, and alleged conspirators acting in

^{*}American Tobacco Co. v. United States, 6th Cir., 1944, 147 F. 2d 93, rehearing denied 324 U.S. 891, affirmed 328 U.S. 781; United States v. General Motors Corp., D.C. Ind., 1939, 26 F. Supp. 353, cert. denied 314 U.S. 618; United States v. Atlantic Commission Co., D.C.N.D., 1942, 45 F. Supp. 187; United States v. National Malleable & Steel Casting Co., D.C. Ohio, 1924, 6 F. 2d 40. Mechan v. United States, 6 Cir., 1926, 11 F. 2d 847; Hughes v. Gault, 1926, 271 U.S. 142.

their individual capacity on the other; nor does the general law on liability of corporate officers support such a distinction. The accepted rule is that officers, directors and agents of a corporation may be held criminally liable for their acts although performed in their official capacity but where they have neither actively participated in nor directed nor authorized a violation of law by their corporation they are not 19 C.J.S., Corporations, Sec. 931; Fletcher, Cyclopedia Corporations, Perm Ed., Vol. 3, Sec. 1348. The antitrust cases decided prior to passage of the Clayton Act do not appear to depart from this general rule. See, for example, the discussion of liability in United States v. Winslow, D.C. Mass., 1912, 195 F. 578, 581. And the legislative history of the Clayton Act discloses no purpose to exempt from prosecution under the Sherman Act persons who have conspired while acting in the capacity of corporate officers.

Section 14 makes it a misdemeanor for an officer to authorize, order, or do anything which contributes in whole or in part to the guilt of his corporation. But aside from the question of whether he has become liable under Section 14, a corporate officer or director may have become liable under Section 1 or 3 of the Sherman Act by engaging in a conspiracy. Of course, if the officer engaged in such a conspiracy while acting within the scope of his authority and in the conduct of the corporation's business then his guilt could be imputed to the corporation, and the corporation as well as the officer could be found guilty under the Sherman Act. And in such situation he would have committed an offense under Section 14 of the Clayton Act as well. But this is not to say that the two offenses are identical. In order for a defendant to be found guilty under Section 14 the Government must prove that the corporation has violated a penal provision of the antitrust laws and that the defendant officer has authorized, ordered, or done something under such circumstances as to have contributed to the corporation's violation. On the other hand, in order to find an officer guilty of conspiracy under Section 1 or 3 of the Sherman Act it need only be proved that the alleged conspiracy existed and that the defendant officer participated in an active way in the conspiracy. For purposes of convicting him it need not be proved that he acted under such circumstances as to make his corporation guilty or that his corporation was, in fact, guilty.

According to Ehrlich v. United States, 5th Cir., 1956, 238 F. 2d 481, 485:

It is settled law, United States v. Gilliland, 312 U.S. 86, 61 S. Ct. 518, 85 L. Ed. 598, that where a single act violates more than one statute, the government may elect to prosecute under either. A defendant cannot complain merely because the charge against him is brought under the statute carrying the more serious penalties when two statutes punish the same general acts. Rosenberg v. United States, 346 U.S. 273, 73 S. Ct., 1152, 97 L. Ed. 1607; United States v. Beacon Brass Co., 344 U.S. 43, 73 S. Ct. 77, 97 L. Ed. 61; Berra v. United States, 351 U.S. 131, 76 S. Ct. 685.

In the Rosenberg case, supra, the claim was made among others that the Atomic Energy Act of 1946 superseded the Espionage Act of 1917 and rendered the District Court powerless to impose the death penalty under the 1917 Act. The following excerpt from the opinion of the court at page 294 relative to the treatment to be accorded two statutes upon the same subject is pertinent here:

Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: "At least where different proof is required

for each offense, a single act or transaction may violate more than one criminal statute." United States v. Beacon Brass Co., 344 U.S. 43, 45 (1952); see also United States v. Noveck, 273 U.S. 202, 206 (1927); Gavieres v. United States, 220 U.S. 338 (1911). Nor does the partial overlap of two statutes necessarily work a pro tanto repealer of the earlier Act. Ibid. "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible * * *. The intention of the legislature to repeal 'must be clear and manifest.' * * * It is not sufficient * * 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be 'a positive repugnancy between the provisions of the new law, and those of the old." United States v. Borden Co., 308 U.S. 188, 198 (1939).

I am aware of the five recent cases in which charges under either Section 1 or 2 or 3 of the Sherman Act were dismissed on the ground that corporate officers are indictable only under Section 14 of the Clayton Act where the offenses charged against them are alleged to have been done in their capacities as officers. These cases are: United States v. National Dairy Products Corp., W.D. Mo., 1961, 196 F. Supp. 155; United States v. A. P. Woodson Company, D.C.D.C. 1961, 198 F. Supp. 582; United States v. American Optical Company, D.C.E.D. Wis., 1961, Crim. Action No. 61-CR-82; United States v. Milk Distributors Association, Inc., D.C. Md., 1961, Crim. No. 25658; and United States v. General Motors Corp., S.D. Cal., 1962, No. 30,132-Crim. In at least four of these cases the District Court appears to have gone beyond the words of the indictment and to have considered a bill of particulars or statements outside the indictment in order to find that the defendant officers were charged solely in their capacity as officers. The indictment here does not restrict the charges against the individual defendants to acts allegedly done in their capacity as corporate officers. But assuming arguendo that it does, I do not find the five last mentioned cases persuasive.

I am of the opinion that the claim of the individual defendants that Section 14 of the Clayton Act affords the Government its sole statutory basis for prosecuting them is not well founded, and that under the allegations of the indictment they are subject to prosecution under Section 1 and 3 of the Sherman Act. Accordingly the motion to dismiss will be denied. An appropriate proposed order should be submitted.

(S) BURNITA SHELTON MATTHEWS, Judge.

JANUARY 29, 1962.

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APR 3 1962

JOHN F. DAVIS CLESK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

V.

RAYMOND J. WISE, APPELLEE

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEE

JOHN T. CHADWELL
RICHARD W. MCLAREN
JAMES A. RAHL
JAMES E. HASTINGS
RICHARD M. CALKINS
135 South LaSalle Street
Chicago 3, Illinois

Of Counsel: CHADWELL, KECK, KAYSER,

CHADWELL, KECK, KAYSER, RUGGLES & MCLAREN

> MARTIN J. PURCELL 1701 Bryant Building Kansas City 6, Missouri

Of Counsel:

Morrison, Hecker, Buck & Cozad

JOHN H. LASHLY
705 Olive Street
St. Louis 1, Missouri

Of Counsel:

LASHLY, LASHLY & MILLER

Attorneys for Appellee

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

V.

RAYMOND J. WISE, APPELLEE

On Appeal From The United States District Court For The Western District Of Missouri

BRIEF FOR APPELLEE

QUESTION PRESENTED

The question presented by this appeal is whether a corporate representative who acts solely in a representative capacity may be prosecuted under the Sherman Antitrust Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. § 1 et seq., if he authorizes or orders an act connected with an antitrust violation on the part of the corporation, or instead whether he may be prosecuted only under Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. § 24.1

^{1.} Indictment, Par. 75, 83 (R. 6-7, 9); Government Bill of Particulars, Answer to Par. 1(a) (b) (R. 34-35); Notice of Appeal, III (R. 43).

STATEMENT

The district court dismissed as to the appellee two Sherman Act counts of the indictment on the ground that these counts charged the appellee only with acting for his corporation in a representative capacity. (R. 39)² The court held that such charges do not properly lie under the Sherman Antitrust Act. The Government having conceded in a bill of particulars that the appellee was indicted solely for things done in his representative capacity (R. 34), the court held that such conduct is completely covered by the provisions of Section 14 of the Clayton Act, and must be prosecuted under those provisions. The Government having disavowed any reliance on Section 14, the court held that dismissal of the counts in question was the appropriate course (196 F. Supp. 155).³

^{2.} In this brief, the abbreviation "R." designates the printed Transcript of Record on Appeal; "G.B." designates the Government's Brief on appeal herein. When used in this brief, the phrase "corporate representative", means a corporate director, officer or agent acting solely in a representative capacity on behalf of his corporation.

^{3.} The indictment is still pending in the district court as to counts charging the corporation with violation of the Sherman Act. Certain other counts charging the appellee and the corporation with violations of Section 3 of the Robinson-Patman Act were dismissed by the district court on constitutional grounds. An appeal from the latter holding in *United States* v. National Dairy Products Corp., No. 173, this Term, has been briefed and argued and decision by this Court is pending.

SUMMARY OF ARGUMENT

I

Appellee, Raymond J. Wise, is charged in the language of a statute which has a maximum fine of \$5,000 (Section 14 of the Clayton Act) but is prosecuted under a statute which has a maximum fine of \$50,000 (Section 1 of the Sherman Act).

The Sherman Act indictment of a corporate officer, Wise, for authorizing or ordering purely corporate acts is in disregard of the intent of Congress and contrary to the plain meaning of the statutory language. It is clear as a matter of plain meaning that the statute which penalizes the corporate officers for authorizing or ordering corporate acts which result in corporate antitrust violations is not the Sherman Act, but Section 14 of the Clayton Act.

H

In 1890 Congress decided to postpone bringing corporate representatives within the Sherman Act, although it had under serious consideration several proposals to include them. A desire to move slowly in this new legislative field and to overcome the opposition to broad criminal penalties brought about a compremise deferring sanctions against individuals not acting for their own account. Thereafter, for twenty-four years Congress gave careful and constant atten-

tion to this subject, and finally in 1914 agreed on a proposal to penalize corporate officials and employees for their participation in antitrust violations by their corporations. Prior to that time, there were no decisions inconsistent with the clearly evident intent of Congress, and in 1913 this Court gave tacit recognition to the fact that no court had decided that corporate representatives as such were subject to the Sherman Act.

Ш

Congress knew that it had not covered corporate representatives in the Sherman Act, and would not have given the subject extended, detailed consideration for twenty-four years and affirmative action in 1914, had it believed otherwise.

The Congressional reports and debates, the action taken, and even the opposition of the minority demonstrate beyond question that Congress (recognizing that the Sherman Act covered corporate officials only if they were acting independently of their corporations or using the corporation as a puppet for individual purposes) intended by Section 14 to extend criminal antitrust penalties to corporate representatives for the first time, and to cover them from then on in an all-inclusive provision. Furthermore, the deliberate decision to reject application of aider and abettor provisions in any form conclusively shows that Congress intended Section 14 to be the exclusive statute penalizing corporate personnel who participate as representatives in corporate antitrust violations.

IV

For forty-one years while Sherman Act and Section 14 penalties were the same, the issue presented here lay dormant because corporate officials did not appear to have anything to gain by claiming that they should be prosecuted under Section 14 and not under the Sherman Act. During this period the relationship of the two sections was not tested or decided. This Court, however, in 1945 in a civil antitrust case recognized and applied the distinction between a corporate official acting for his own account and one acting solely for his corporation and significantly recognized that a corresponding distinction pertained to criminal liability, with Section 14 as the statute that applied to representative participation in criminal corporate violations.

The issue now presented originated in 1955 when Congress, desiring to increase the penalties on business entities, particularly corporations, raised Sherman Act fines to \$50,000. The issue was first decided by the court below, and since that decision there have been four additional decisions and opinions holding Section 14 to be the exclusive section applicable. There is only one contrary opinion, which is dictum on this issue, and possibly one additional contrary, but unexplained decision.

The statutory framework dealing with criminal antitrust violations by a corporate entity draws a sharp distinction between penalties against the corporation and penalties against its representatives. The court below properly applied the statutory mandate.

ARGUMENT

INTRODUCTION

The appellee was indicted for having "authorized or ordered" certain acts alleged to have been done by his corporate employer, National Dairy Products Corporation, in violation of the Sherman Act. The charges come directly within the scope of Section 14 of the Clayton Act, and are actually a virtual copy of that section. Section 14 states:

"Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." (Emphasis supplied)

The district court held that this section, not the Sherman Act, is the foundation for and the limitation upon the criminal liability of corporate officers. The decision was the first case to rule directly upon the issue since the enactment of Section 14. As the Government has pointed out, this appeal involves a case of first impression (Juris. State. 5).

Since the district court's decision, four other courts in cases presenting the same issue have concurred, holding in reported opinions that Section 14 is the exclusive basis for prosecution of such cases. In United States v. A. P. Woodson Co., 198 F. Supp. 582, 584 (D.D.C. 1961), Judge McLaughlin held that Congress intended the Sherman Act "to apply exclusively to corporate trusts and individuals acting in their individual capacities", and that Section 14 of the Clayton Act "was intended to be the exclusive remedy against corporate officials acting in their corporate capacities." In *United* States v. American Optical Co., 1961 Trade Cases, Par. 70,156 (E.D. Wis. 1961), Judge Tehan's opinion stated that he was "in complete agreement" with the decisions and the reasoning in National Dairy and Woodson. In United States v. Milk Distributors Ass'n., Inc., 200 F. Supp. 792 (D.Md. 1961), Judge Watkins referred to the above decisions as "Three well-reasoned opinions" and held that "Section 14 of the Clayton Act is exclusive as to charges against individuals in their representative capacity" (Id. 801). The same decision was also reached, with a summary opinion, in United States v. General Motors Corp., Cr. No. 30,132 (S.D. Cal. 1962). 1962 Trade Cases Par. 70203.4

The only contrary opinion5 rendered on this issue is

^{4.} The Government has filed a notice of appeal to this Court in the American Optical and General Motors cases. It has appealed to the Court of Appeals for the District of Columbia in the Woodson case. (G.B. 10, note 2)

^{5.} Cf. the Government's statement that a similar motion was denied in *United States* v. Packard-Bell Electronics Corp. (S.D. Cal.) (G.B. 10, note 2). There was no opinion, however, and it is noteworthy that the indictment also contains charges under Section 14, 5 CCH Trade Reg. Rep. par. 45,061, case 1632.

United States v. North American Van Lines, Inc., Cr. No. 527-61 (D.D.C. 1962), where Judge Matthews denied a motion to dismiss Sherman Act counts against corporate officers. (G.B., App. C.) The decision is not in point, however, since the Government, itself, construed the indictment as charging the individual defendants in a dual capacity, i.e. as representatives and "in a personal capacity," and the court expressly rested its decision upon that ground (G.B. 83, 92-93). The opinion of the court on other issues is clearly dictum.

There were no decisions on this issue prior to these recent² cases. Although the Government has habitually ignored Section 14 and has customarily indicted corporate representatives under the Sherman Act,⁶ defendants have heretofore not had occasion to raise the issue. The reason for this hiatus is clear and the past judicial failure to resolve the issue has no significance on this appeal. Until 1955, the penalties for violation of Section 14 and of the Sherman Act were the same. Individual defendants had no incentive to attempt test cases on this issue with the likely prospect of only an academic victory. But on July 7, 1955, Congress decided to increase the maximum fine under the Sherman Act to

^{6.} Evidently the only case in which the Government obtained an indictment under Section 14 prior to the district court decision in the instant case was *United States* v. *Potts*, Cr. No. 56-157-N (D. Mass.) (G.B. 51) filed June 28, 1956. This case does not reveal any obstacles to Government use of Section 14. The district court granted the Government's own motion for *nolle prosequi* after indictments charging corporate defendants were dismissed for failure to state an offense (CCH Trade Regulation Reports, New U. S. Antitrust Cases 1957-1961, Par. 45,003, Case No. 1294).

\$50,000, while retaining the original maximum fine of \$5,000 under Section 14 (69 Stat. 282). The importance of then attacking the erroneous premise upon which prosecution of corporate representatives had theretofore been founded by the Government became clear for the first time. Otherwise the Government would have the option of proceeding against corporate representatives under either one of two statutes with widely divergent penalties.^{6a}

"The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation . . . I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice."

"Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here." (351 U.S. at 138, 140.)

⁶a. Judge Watkins in Milk Distributors, 200 F. Supp. 792, 799 pointed out these dangers, referring to "overtones" implicit in Berra v. United States, 351 U. S. 131 (1956). These overtones in Berra, to which he referred, are emphasized by the dissenting opinion of Mr. Justice Black (in which Mr. Justice Douglas joined). In reply to the Government's argument that it may proceed under either of two criminal statutes, a question the majority did not find necessary to decide in that case, Mr. Justice Black, stated:

The strong majority response of the district courts since the issue has been squarely presented has been based upon the intent of Congress, as clearly manifested in the language of the statutes concerned and in the pertinent legislative history, as we shall show in succeeding sections of this brief.⁷

I.

THE PERTINENT STATUTORY PROVISIONS, WHEN READ TOGETHER, REQUIRE THAT CORPORATE REPRESENTATIVES BE PROSECUTED UNDER THE PROVISIONS OF SECTION 14 AND NOT UNDER THE SHERMAN ACT.

The issues on this appeal turn upon a reading of Section 14 of the Clayte — ct and of the substantive provisions and definition section of the Sherman Act. These statutory provisions must be read together, for they are integral parts of a single system of antitrust policy and enforcement. When they are read together, it is clear from their wording and inherent meaning that Congress has provided in Section 14 the exclusive basis for and the measure of the criminal liability of corporate personnel acting in a representative capacity.

The District Court in the present case followed customary rules of statutory interpretation in dismissing the Sher-

^{7.} The Government suggests (G.B. 13) that if it is required to follow Section 14, it will encounter certain difficulties. To the extent that any difficulties are specified, they seem minor on their face. (*Ibid.*) In any event, procedural difficulty for the prosecution is not a valid reason for ignoring the intent of Congress.

man Act counts as to appellee and in holding that the liability of one in appellee's position must be established under and governed by Section 14. As the court stated, this result is:

"in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force." (196 F.Supp. at 157)

A. The Language and the Substantive Meaning of Section 14 Require That Corporate Representatives Be Prosecuted Under Its Terms for the Conduct Described Therein.

It is not necessary to go beyond the language and terms of Section 14 to resolve the issue on this appeal. In direct, uncomplicated language the statute states: "Whenever" a corporation violates any penal provision of the antitrust laws, such violation shall be deemed also to be "that of the individual directors, officers, or agents . . . who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation." This violation (by the corporate representative) is to be deemed a misdemeanor under this section and "punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

The plain meaning of these words is that "whenever"

(which means "at whatever time") s the described situation occurs of participation by a corporate official in a corporate violation, the official shall be convicted and punished according to the prohibitions and the limitations of this section.

Section 14 is a complete and comprehensive prohibition. It deals with the whole subject of participation by corporate officials in corporate violations. While it looks to the "penal provisions" of the antitrust laws, e.g. the Sherman Act, or the Wilson Tariff Act, 28 Stat. 570, 15 U.S.C. § 8, for interdiction of the corporate violation, it does not provide that the individual corporate official shall be convicted and punished under the penal provisions violated by the corporation. On the contrary, it provides its own standards and its own punishment. It dictates that the violation with which the individual is to be charged is the misdemeanor provided for by this section. The individual is to be convicted of this misdemeanor, and punished as provided in this section.

The Government has offered no construction which will gives this language any meaning other than its plain signification. Its only comment is that Section 14 does not contain words to negative prosecution for the same conduct under the Sherman Act (G. B. 11). But this is of no significance. In its criminal statutes, Congress affirmatively describes what is prohibited and how the offense is to be dealt with.

^{8.} Webster's Third New International Dictionary 2602 (1961).

Having described the offense comprehensively, Congress surely need not go on to say that prosecution shall *not* be carried on by the Justice Department under other earlier statutes having less or no express applicability.

The substantive scope of the prohibitions of Section 14 equally manifests Congressional intent to govern the subject of a corporate official's antitrust liability in this section. The statute expressly embraces all "directors, officers or agents" of the corporation. It provides for the conviction of all such individuals who have either "authorized," or "ordered," or "done" any of the acts which brought about the corporate violation. It applies regardless of whether such act or acts constituted the "whole" corporate violation, or were only a "part" of such violation. The statute thus applies to every kind of corporate representative and to every kind of conduct by such an official which could produce a corporate violation. In particular, it applies exactly to the allegations of the present indictment in which appellee was charged solely with having "authorized or ordered to be done some or all of the acts alleged" to have constituted Sherman Act violations on the part of the corporation, National. (R. 7, 9)

On its face, the statute thus defies the inference that Congress did not mean for this comprehensive provision to control the future prosecution of corporate representatives. The Government, however, contends that this broad provision has only the narrowest significance. Indeed, to the Govern-

ment, its contribution to the antitrust laws is envisioned as being so slight that barely any use for it at all can be discerned. The Government concedes only that Congress "thought" it was doing something new in enacting Section 14 (G. B. 47). Whether it really did so is, to the Government, a "difficult question." (*Ibid.*).

The question is difficult only if it is assumed that Congress was engaged in a largely useless activity in 1914. But since the Government concedes that the governing question on this appeal is the intent of Congress and that Congress thought it was doing something significant in enacting Section 14, it follows that the enactment must be given its face value as an expression of Congressional intent, and not be interpreted away into a meaningless and empty Congressional gesture.

Seeking some role for Section 14 in order to explain its enactment, the Government suggests that perhaps Congress added a very little to the supposed existing Sherman Act coverage by covering in Section 14 officers who have "authorized" corporate violations. Officers who have "ordered, or done" the acts, it is said, were already covered by the Sherman Act, but it was "doubtful" whether "authorizing" was covered (G.B. 45).

This attempted distinction between "ordering or doing" a violative corporate act and "authorizing" a corporate violation has no basis at all in the language of the Sherman

Act and is completely implausible, as shown by the fact that the Government does not support it either in theory or with precedent. It would seem beyond dispute that a superior corporate official who gives authority to carry out a violation would be every bit as culpable as the inferiors who carry it out. If the Sherman Act already possessed in 1914 the sweeping applicability to corporate officials claimed for it by the Government, it would have made no sense to doubt that it would reach the persons at the top who were more responsible than any others for the corporate violation.

As we point out in the next section, the real reason for inapplicability of the Sherman Act is that corporate officers are not "persons" within the meaning of the statute and are not dealt with by its substance. If they were, then the conspiracy provisions of the law would obviously cover those who "authorize" wrong-doing, as well as those who order it or commit it. It is elementary under the antitrust laws that knowing adherence to an unlawful conspiracy makes a "person," who legally is otherwise subject to the law, a conspirator, United States v. Masonite Corp., 316 U.S. 265, 274-76 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939); United States v. United States Gypsum Co., 333 U.S. 364, 389 (1948). Persons who have simply "acquiesced" in a conspiracy may be treated as part of it, United States v. Paramount Pictures, Inc., 334 U.S. 131, 146-47 (1948). And participation in a Sherman Act conspiracy occurs at the moment of entry into an unlawful

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agreement, with no overt action whatever being required, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26, note 59 (1940).

In Section 14, Congress covered all categories of action by corporate officials. If it meant, as the Government claims, to add only a small bit to prior law, why did it thus cover the whole spectrum of conduct by those who have "authorized, ordered or done" the corporate wrong and the whole range of corporate personnel—"directors", "officers" and "agents"?

B. The Sherman Act Does Not, In Terms Or Substance, Embrace Corporate Officials Acting In a Purely Representative Capacity

Section 14 is so explicit that it could be held to have superseded the Sherman Act to the extent of its scope, were it necessary to do so. But it is not at all necessary for the Court to go that far, for the Government is in error in

^{9.} The attempt (G.B. 44) to use the remarks of Representative Floyd on the floor of the House in 1914 to support the Government's interpretation of Section 14 fails on its face. Representative Floyd said that Congress wanted not only to reach those who "authorized" corporate violations, but also those who "ordered" them. Both classes of persons were equally outside the Sherman Act to Mr. Floyd. But the Government is unwilling to concede that the Sherman Act ever failed to reach those who "ordered" violations (G.B. 45), and it thus agrees with half of his view and disagrees with the other half. The quoted statement of Mr. Floyd shows that Congress was counting on Section 14 to deal with all responsible corporate officials (G. B. 44-45).

phrasing the issue on this appeal in terms of whether there was supersession or implied repeal of Cherman Act coverage (G.B. 6, 32). The terms and substance of the Sherman Act simply do not cover corporate officials acting in their purely corporate, representative capacity.

The Government says that the phrase, "every person," in Section 1 of the Sherman Act "obviously includes a corporate official, and if such officials engage in the conduct prohibited by the Act, they are subject to the Act's criminal provisions" (G.B. 11). But there are two fundamental and erroneous assumptions underlying this statement. The phrase "every person" does not include corporate officials acting in their representative capacities. And while it is true that persons who are corporate officials may violate the Act through conduct undertaken for their own account and behalf, such officials cannot "engage in the conduct prohibited by the Act" when acting in a purely representative capacity.

The substance of the Sherman Act does not reach corporate representatives because the Act was aimed at individual entrepreneurs and business entities, whether corporate or non-corporate.¹⁰ The language used plainly

^{10.} This principle received early recognition in a Sherman Act case cited by the Government. In re Greene, 52 Fed. 104 (C.C. S.D. Ohio 1892) held, with respect to a Sherman Act indictment of an individual, that if the acts charged were criminal offenses, then his corporation was the "person" which committed the violations under the Sherman Act (Id. 119).

shows that Congress was thinking only of those who in legal contemplation are in a position to restrain trade or to monopolize. Section i prohibits in common law language, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce***" These words obviously refer to the actions of economic entities. The section goes on explicitly to limit its prohibitions to those entities, by providing that "Every person" who shall make an illegal contract or "engage in" an illegal combination or conspiracy shall be guilty of the misdemeanor established by the statute. The term, "make" a contract, has a well-established legal meaning, plainly referring to the parties to the contract. The mere employee or agent who acts on behalf of a disclosed principal is never considered to be one who "makes" the contract.

Similarly, the term, "engage in" any combination or conspiracy in restraint of trade, does not aptly refer to a mere agent or employee of a business entity which restrains trade through combining or conspiring with others. A corporate representative, acting in that capacity, cannot reasonably be thought of as himself engaging in restraint of trade when his corporation violates the law. Trade is restrained by those business entities which are engaged in trade, not by their employees who, both legally and economically, have no power to restrain trade.

The flaw in the Government interpretation is revealed by the great theoretical difficulties it creates. If a corporate representative were to be regarded as "engaging in" the conspiracy of his corporate principal, it would mean that he would be a co-conspirator with his own corporation. But this would create havoc in the law, and would be directly contrary to the established principle that a corporate employee is legally incapable of conspiring with his own corporation where he acts within the scope of his employment. Nelson Radio & Supply Co. v. Motorola, Inc., 200 F. 2d 911, 914 (5th Cir. 1952); Goldlawr, Inc. v. Shubert, 276 F. 2d 614, 617 (3d Cir. 1960); Marion County Co-op. Ass'n v. Carnation Co., 114 F. Supp. 58, 62 (W.D. Ark. 1953). This principle was recognized before the passage of Section 14, as the Government acknowledges (G. B. 24).

The unsoundness of treating a corporate representative as within the substantive prohibitions of the Sherman Act is further demonstrated by reference to the terms of Section 2 of the Act. That section provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize . . ." shall be guilty. The word, "person," in this context plainly could mean only the entrepreneur, whether a corporation or an individual. It could not mean a mere agent of a corporation because such an agent would be totally incapable of "monopolizing" in his representative capacity.

The substantive inapplicability of the Sherman Act to corporate officers is further directly reflected in the fact that the word, "person," as defined in the statute, does not include corporate officers. Section 8 of the Act (15 U.S.C. § 7) provides:

"That the word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

It is of great significance that this definition makes no mention of corporate officials. It is a basic premise of statutory construction that Congress cannot be deemed to have intended to punish anyone who is not "plainly and unmistakably" within the confines of the statute. United States v. Lacher, 134 U.S. 624, 628 (1890); United States v. Cardiff, 344 U.S. 174, 176 (1952); United States v. Gradwell, 243 U.S. 476, 485 (1917). The legislature must with reasonable certainty specify those encompassed by a penal provision. United States v. Harris, 177 U.S. 305 (1900); Sarlls v. United States, 152 U.S. 570 (1894). If Congress had meant to bring such officials within the scope of the law, it would have been an exceedingly simple thing to have done so expressly. See for example Bankruptcy Act, 30 Stat. 544, 11 U.S.C. § 1 (19). As the discussion of the legislative history of the Sherman Act in the next section shows, proposals to do that were common in Congress, but they were never accepted.

The Government attempts to give the word "person" in the Sherman Act an all-inclusive meaning, but cites no authority, apparently suggesting that whenever "person" is used in a statute it always includes all human beings whatever their status or capacity. But as used in statutes outlawing certain business practices its juristic definition is normally far more limited in scope and dependent upon the intent of the lawmakers.¹¹

This Court has held that this word in the Sherman Act has a specialized significance which is not all-inclusive. In United States v. Cooper Corp., 312 U.S. 600 (1941), the Government urged that the United States is a "person" under the Act, entitled to maintain a treble damage suit. The Court held otherwise, however, and in doing so flatly rejected the Government's contention that Section 8's definition should be liberally construed because "any other construction would turn words of inclusion into words of crippling limitation." The Court stated that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." (Id. at 605; cf. Georgia v. Evans, 316 U.S. 159 (1942) holding that a state may maintain a damage action but agreeing with Cooper that "person" in the Sherman Act has a specialized

^{11.} Webster's Third New International Dictionary 1227 (1961) defines "juristic person" as "a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties—called also artificial person, conventional person, fictitious person."

meaning to be derived from the intent of Congress.) It may with even greater force be said that it is not a necessary or desirable judicial function to engraft on one statutory provision a coverage which Congress has explicitly placed in a different provision.

As to a statute containing an analogous use of the word, "person," the Court has found that this word does not encompass corporate representatives. In *United States* v. *Dotterweich*, 320 U.S. 277 (1943), the Court indicated that it is the corporation, not the officer, which is directly covered by the word "person" in the prohibitions of the Federal Food, Drug and Cosmetic Act. The dissent agreed, is the disagreement existing only as to the majority's holding that the corporate officer could nevertheless be held in that case as one who had aided and abetted the violation. As we will show in the later discussion in this brief of the legislative history of Section 14 of the Clayton Act, the general aiding and abetting approach for antitrust violations was specifically voted down and rejected by Congress in 1914, so that that theory can have no applicability in the present case.

^{12. &}quot;To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty" (Id. 284).

^{13. &}quot;The normal and necessary meaning of such a definition of 'person' is to distinguish between individual enterprises and those enterprises that are incorporated or operated as a partnership or association, in order to subject them all to the Act. This phrase cannot be considered as an attempt to distinguish between individual officers of a corporation and the corporate entity" (Id. 287, n. 2).

In summary, the language and inherent meaning of the statutory provisions in issue are sufficient in themselves to dispose of this appeal. Section 14 clearly governs the conduct alleged in the indictment. The Sherman Act, both in terms and in substantive theory, clearly does not cover this particular conduct. While these provisions are themselves the most authoritative expression of the intent of Congress, it will be shown in succeeding sections that any conceivable doubts as to this conclusion are removed by the legislative history of the Sherman Act and of the Clayton Act, and that this result is not in the least inconsistent with cases relied upon by the Government brief.

II.

PRIOR TO THE ENACTMENT OF THE CLAYTON ACT IN 1914, CRIMINAL ANTITRUST PENALTIES DID NOT APPLY TO CORPORATE PERSONNEL ACTING SOLELY IN A REPRESENTATIVE CAPACITY.

A. Congress Considered But Rejected Penal Provisions Encompassing Corporate Representatives, Limiting Penal Coverage to Business Entities, Corporate and Non-Corporate

Congress has, on many occasions, demonstrated its ability to apply statutes in no uncertain terms to corporate officers as distinct from corporations.¹⁴ For example, three

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^{14.} Bankruptcy Act, 30 Stat. 544 (1898), 11 U.S.C. §§ 1, 11; Hours of Service Act, 34 Stat. 1416 (1907), 45 U.S.C. § 63, compare to Safety Appliances Act, 36 Stat. 299 (1910), 45 U.S.C. §13, and Sherman v. United States, 282 U. S. 25 (1930), decided thereunder; Ship Mortgages Act, 41 Stat. 1003 (1920), 46 U.S.C. § 941; Interstate Commerce Act, 24 Stat. 382 (1887), 49 U.S.C. § 10.

years prior to the enactment of the Sherman Act, Congress enacted just such a statute, the Interstate Commerce Act, 24 Stat. 382, § 2 (Feb. 4, 1887), which made any corporate director, officer, receiver, trustee, lessee, agent, or any person acting for or employed by such corporation, amenable to its penalties.

Beginning in 1888 and continuing through 1890, no less than twelve bills were introduced in both Houses of Congress which would have included corporate officers and agents within the penal prohibitions of the proposed antitrust bill. The following is a brief summation of the scope of these bills.

50th Congress (1888)

- S. 3445, included officers, agents, and attorneys (of both corporations and individuals), stockholders, trustees, committees, and persons acting in "any capacity whatever."
- 2. H.R. 6113, included officers and directors.
- 3. H.R. 6117, included officers.
- H.R. 11401, included agents, attorneys, and representatives of firms, copartnerships, corporations or associations.
- 5. H.R. 11534, same as H.R. 11401.

51st Congress (1889)

- 6. S. 1, same as S. 3445.
- 7. S. 62, included agents and managers.
- 8. H.R. 270, same as S. 3445.

- 9. H.R. 313, included officers.
- 10. H.R. 402, included agents and employees.
- 11. H.R. 830, same as H.R. 6113.
- 12. H.R. 3353, included persons acting in any capacity whatever.

The legislative consideration of two bills, the Sherman bill, S. 1, and the Reagan bill, S. 62, forerunners of the Sherman Act, which were considered by the Senate and submitted to the Committee on the Judiciary, most clearly establish the intention of Congress to omit corporate officers from penal coverage. The Sherman bill went through a rather intricate cycle of first being introduced without a penal provision, having one added, and then having it removed when finally submitted to the Committee on the Judiciary.

The penal provision, Section 3 of the bill, which was extremely comprehensive in coverage, covered officers and agents of corporations, agents and attorneys for "another," stockholders, trustees, committees, and persons acting in "any capacity whatever." With this penal provision, the bill was bitterly attacked, particularly by Senator George, a member of the Judiciary Committee. He emphasized that as a penal statute and therefore subject to strict construction, it would be held unconstitutional by the courts.

Senator Sherman subsequently amended the bill and eliminated Section 3, declaring that since Congress was

dealing with new subject matter the Committee on Finance considered it advisable "to declare the general principle of law, without any criminal section, leaving Congress to provide hereafter criminal penalties, as I have no doubt it will do if they shall be found to be necessary" (Id. 2562).15 He further added that the primary concern of the act was to punish corporations, not their servants. "These corporations do not care about your criminal statutes aimed at their servants. They could give up at once one or two or three of their servants to bear this penalty for them" (Id. 2569). Although he finally approved the penal provision in the Reagan bill, which had been added as an amendment to his own, he made it clear that his original retreat from a strong bill was in deference to the "fears and timidity" of other Senators "who were afraid we were going too far" (Id. 2570).

The Reagan bill, unlike the original Sherman bill, had a limited penal provision when first introduced which subjected "any person who may be or may become a member of any such trust, or who may be or may become engaged in the business of any such trust" to criminal punishment. When Senator Sherman eliminated Section 3 of his bill, Senator Reagan submitted his own bill as an amendment, being of the opinion that absence of penal coverage would

^{15.} Senator Sherman also said, "To punish the criminal intention of an officer is a much more difficult process and might be well left to the future" (21 Cong. Rec. 2457). (Emphasis supplied.)

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eviscerate the act. It is significant, however, that a new provision had been added to the Reagan bill which expanded penal coverage and specifically encompassed corporate agents and managers. This new provision provided:

"That all persons engaged in the creation of any trust, or as owner or part owner, agent, or manager of any trust, employed in any business carried on with any foreign country, or between the States, . . . or any owner or part owner, agent or manager of any corporation using its powers for either of the purposes specified in the second section of this Act, shall be deemed guilty of a high misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding ten thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, or by both of said penalties, in the discretion of the court trying the same."

Though this penal provision included corporate officers, it was a considerable retreat from the broad scope of Section 3 of the Sherman bill.

In this posture the Sherman bill, without a penal provision, and the Reagan amendment with the above described penal section, were considered by the Senate and submitted to the Committee on the Judiciary (21 Cong. Rec. 2731). The Committee then redrafted the bill under the guidance of Senators Edmunds, George and Hoar, and the latter Senator submitted it to the Senate where it was eventually passed, 52 to 1 (*Id.* 3152).

The legislative history therefore demonstrates that Congress did not intend to cover corporate and other representatives for the following reasons:

- 1. Congress knew that it could, if it desired, broaden statutory coverage to include representatives and agents. It had enacted similar legislation which included representatives prior to its consideration of the Sherman Act. It had thoroughly considered proposals for inclusion in the Sherman Act which would have covered representatives and agents under the Sherman Act.
- 2. Having considered these proposals (specifically Section 3 of the original Sherman Bill and the Reagan Amendment), Congress rejected the broad coverage. This rejection of the broader coverage at the time of original enactment is a strong indication of legislative intent. Blau v. Lehman, 368 U.S. 403, 411 (1962).
- 3. Where the legislative history shows specific reasons for Congressional rejection of broader coverage, this is persuasive in determining Congressional intent. Blau v. Lehman, 368 U.S. 403, 411-12, n. 12 (1962). The reasons for not including corporate agents and representatives within the coverage of the Sherman Act are readily apparent. First, Congress was principally concerned with remedying the evils perpetrated by trusts and "single persons of large wealth." See In re Greene, 52 Fed. 104, 119 (C.C. S.D. Ohio 1892) where the court stated: "The enactment was manifestly aimed at the trust combinations and associations

formed by individuals and corporations, which the state courts in most instances have declared illegal."16 Second, there was strong opposition in Congress to any criminal penalties as demonstrated by the position taken by Senator Sherman in deference to the "fear and timidity of others who were afraid we were going too far." Third, there is no indication that any Senator or Representative favored the all-encompassing coverage of proposed Section 3 of the Sherman bill, which was no broader than the Government's construction of Section 1 here. 17 Even the far more limited Reagan Amendment received only 34 affirmative votes with 12 senators voting against it. Fourth, there was an expressed desire on the part of Congress to proceed slowly, using a step by step approach and then "when the limits of the power of Congress over the subject-matter shall be defined by the courts" increase the scope of coverage where the need arose (21 Cong. Rec. 2456, 2457, 2570. See also

^{16.} Senator George stated that he was "extremely anxious that some bill shall receive the assent of this Congress which will put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell" (21 Cong. Rec. 1458).

^{17.} The Government's interpretation of "every person" in Section 1 of the Sherman Act is as broad if not broader than the phrase "person... in any capacity whatever" of Section 3 of the original Sherman bill. Senator Sherman stated that whether Section 3 of his bill should extend to office clerks as provided therein was a matter of grave doubt and an underlying reason for not including that provision in the bill (21 Cong. Rec. 2456).

the remarks of Senator Hoar, 36 Cong. Rec. 523, infra, at 35).

These reasons led to a compromise which included and accounted for the rejection of the broader coverage which would have made agents and representatives liable along with the business entities for whom they acted. This compromise is clearly shown in the subsequent evaporation of opposition to the Sherman Act in the Senate and the passage of the bill by a 52 to 1 vote.

B. After the Sherman Act Was Passed, Congress Did Not Regard It As Covering Representatives of Business Entities.

As shown in the preceding section, Congress did not intend that persons acting solely in a representative capacity should be individually liable under the Sherman Act; the Sherman Act was a compromise and broader coverage was to be left to the future. The legislative pattern from 1890 to 1914 bears this out completely. During that period no less than fifty-one bills¹⁸ were introduced in Congress which proposed to amend the Sherman Act or supplement it,

^{18.} S. 1268, H.R. 166, H.R. 432, H.R. 4600, 52d Cong., 1st Sess. (1892); S. 682, S. 1167, 53d Cong., 1st Sess. (1893); S. 192, S. 244, 54th Cong., 1st Sess. (1895); S. 2330, H.R. 7492, 55th Cong., 1st Sess. (1897); H.R. 7938, 55th Cong., 2d Sess. (1898); H.R. 8199, H.R. 10539, H.R. 11001, H.R. 11002, H.R. 11667, 56th Cong., 1st Sess. (1900); S. 649, H.R. 3, H.R. 2069, H.R. 4581, 57th Cong., 1st Sess. (1901); H.R. 11988, H.R. 14947, 57th Cong., 1st Sess. (1902); S. 6600, S. 6659, 57th Cong., 2d Sess. (1902); H.R. 17051, 57th Cong., 2d Sess. (1903); H.R.

and which included language which would have covered persons acting solely in a representative capacity. This long parade of bills stretching from 1890 to 1914 cannot be dismissed as a mistaken belief by Congress that such an amendment or supplement was necessary, as the Government implies (G.B. 33-34, n. 15). Instead they represent a studied and persistent conviction on the part of Congress that the Sherman Act applied to business entities but not to their representatives. This conviction stemmed from and was in accord with the legislative history of the Sherman Act discussed under point A. above.

An examination of the bills starting in 1892 and continuing until 1914 demonstrates that this question was constantly before Congress and that by a slow process of trial and error Congress gradually firmed up the legislative provisions which emerged in 1914 as Section 14 of the Clayton Act. Thus, the period of gestation of Section 14 did not take place immediately prior to its passage. Instead, its origins are found back in 1890 and its growth came by a steady process of evolution over the twenty-four year period.

^{1226,} H.R. 3591, 58th Cong., 1st Sess. (1903); H.R. 19048, 58th Cong., 3d Sess. (1905); H.R. 15329, H.R. 18801, 59th Cong., 1st Sess. (1906); S. 3736, 61st Cong., 2d Sess. (1909); S. 8531, 61st Cong., 1st Sess. (1910); H.R. 26541, 61st Cong., 2d Sess. (1910); S. 2158, H.R. 10508, H.R. 11855, H.R. 12624, H.R. 12809, H.R. 13909, 62d Cong., 1st Sess. (1911); S. 3345, H.R. 14063, H.R. 16285, 62d Cong., 2d Sess. (1911); S. 4103, S. 5486, H.R. 23470, 62d Cong., 2d Sess. (1912); S. 7680, 62d Cong., 3d Sess. (1912); S. 191, S. 486, S. 1375, H.R. 1890, H.R. 2958, H.R. 4326, H.R. 4548, 63d Cong., 1st Sess. (1913).

Several of these bills proposed an amendment to Section 8, which would have expanded the definition of "person" to include "agents, officers, and attorneys of said corporations and associations." A number of others incorporated aider and abettor provisions. 20

Of particular significance is the legislative history of a bill that was passed in the House on April 7, 1900. That bill proposed an amendment to Section 8 of the Act which would have redefined "person" as follows:

"That the word 'person' or 'persons' wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of the Territories, the laws of any State, or the laws of any foreign country, and the agents, officers, and attorneys of said corporations and associations," (H.R. 10539, 56th Cong., 1st Sess. (1900); emphasis supplied).

The House Judiciary Committee Report to the bill stated:

"Section 8 of the present law did not include in the definition of 'person' or 'persons' the agents, officers,

See for example Senate bill, S. 649, 57th Cong., 1st Sess. (1901); House bills, H.R. 10539, 11002, 11667, 57th, Cong., 1st Sess. (1900); H.R. 3, 57th Cong., 1st Sess. (1901); H.R. 11988, 14947, 57th Cong., 1st Sess. (1902).

^{20.} See Senate bills, S. 682, 53d Cong., 1st Sess. (1893); S. 192, 54th Cong., 1st Sess. (1895); S. 2330, 55th Cong., 1st Sess. (1897); House bills, H.R. 4600, 52d Cong., 1st Sess. (1892); H.R. 7492, 55th Cong., 1st Sess. (1897); H.R. 11855, 62d Cong., 1st Sess. (1911).

and attorneys of the corporations and associations referred to, and their action as such agents, officers, and attorneys did not subject them to any penalties under the law. . . ." H. Rep. No. 1506, 56th Cong., 1st Sess. (1900).

The minority members of the House Committee on the Judiciary, even more desirous of strengthening the Act, sought to add criminal provisions encompassing corporate officers and agents, to several new provisions in the bill. One proviso read that "every person who shall make, or enter into, or engage in, any such contract, combine, device, trust, or combination in the form of trust or otherwise, or conspiracy, or shall be a promoter thereof, or officer or agent therein, shall be deemed guilty of a misdemeanor . ."²¹ (Emphasis supplied)

Representative Overstreet, in defending the bill stated:

"It has been found in many instances where corporations have violated the laws which subject them to fines that they have little care for the expense inci-

^{21.} H. Rep. No. 1506, Part 2, 56th Cong., 1st Sess. (1900). Representative Parker, in a separate minority report stated:

[&]quot;The undersigned desires to express his entire agreement with the bill reported by the committee, except as to one section. Valuable amendments to the Sherman law are proposed, not only in increasing the penalties for its violations, but in extending them to officers and agents, extending the right of prosecution to those who are injured, and in protecting witnesses." H. Rep. No. 1506, Part 3, 56th Cong., 1st Sess. (1900).

dent to the payment of such fines, and the officer, agent, attorney, or manager is never liable, and escapes under the cloak of his corporate existence. The individual is little concerned if the corporation pays his fine. If he shall be made liable personally, and if convicted, imprisoned, he will exercise more care.

"This Committee believes that by increasing those penalties so as to fix definitely upon the violator the probability of imprisonment, and adding to the persons who may become liable under the law the officers, the attorneys, the managers, and the agents, of such concerns, they will hesitate far more than they have in the past before they care to violate this statute. . . .

"Section 8 of the bill defines the word 'person,' wherever used in the act 'to include corporations and associations.' Your committee has enlarged by amendment that term and definition and adds to its meaning, wherever the term 'person' shall be used in the act, 'the agents, officers, and attorneys of such corporations and associations.'" (33 Cong. Rec. 6477; emphasis supplied).

In the Senate, the bill was submitted to the Senate Committee on the Judiciary. Senator Hoar, one of the principal authors of the Sherman Act, introduced an amendment that differed considerably from the House bill, but significantly retained the expanded definition of the word "person" incorporated in that bill (34 Cong. Rec. 2728). Although the bill never became law, it is quite clear that both the House majority and minority and leading members of the Senate found the phrase "every person" inadequate to penalize corporate officers and agents.

In 1902, Senator Hoar, then Chairman of the Senate Judiciary Committee, introduced a bill which would have broadened the coverage of the Sherman Act to make liable the "president, director, treasurer, officer, corporator, copartner, associate, or agent" of a corporation or other business entity (S. 6659, 57th Cong., 2d Sess. 1902).

In commenting on his bill he stated that "It is but one step farther. I adhere to the opinion I entertained when the present law was drawn—that we should go very slowly and carefully, taking one step in legislation, at a time; and then waiting for the exposition of the courts, and until some practical trial has taught the law officers of the Government what is practicable and what is needful. It was with that expectation that the law, commonly called the Sherman antitrust law, was fashioned" (36 Cong. Rec. 523).

Senator Hoar's bill and remarks accurately reflected the mood of Congress during the period between 1890 and 1914 while Congress was slowly working out, by trial and error, the language which evolved into the Clayton Act in 1914.

C. The Intent of Congress to Exclude Corporate Representatives from the Sherman Act was not Negatived by any Supposed Common Law Criminal Rules or Supplanted by Decisions Which Dealt With Individuals Acting for Their Own Account.

When Congress defined the word "person" in the Sherman Act to include a corporation, it did not also include the representatives of the corporation as "persons." This plain meaning and the legislative history supporting it are unmistakable. So far as the corporate form of doing business was concerned only the corporate entity was brought under the Sherman Act. Coverage of representatives of the corporate entity was left to the future.

What does the Government offer to overcome this clearcut meaning and intent? First, the Government contends that when Congress enacted the Sherman Act in 1890 it had in mind what the Government says was a common law rule of crimes that an agent who participates in a misdemeanor committed by his principal is also liable as a principal (G.B. 14-15). In support of its proposition it cites a heterogeneous group of fifteen cases. All but three are state court and foreign cases.²² Tyler v. Savage, 143 U.S. 79 (1892) was a civil fraud case and has no bearing here. The other two

^{22.} The Government devoted less than a page to discussing all fifteen. The twelve state and foreign cases are not applicable to questions of federal criminal law. Three applied an aider and abettor statute and were decided after 1890, People v. Clark, 8 N.Y. Crim. Rep. 179, 14 N.Y. Supp. 642 (1891); State v. Ross, 55 Ore. 450 (1910); Rex v. Hays, 14 Ont. L.R. 201 (1907). Also decided in or after 1890 were People v. Detroit White Lead Work, 82 Mich. 471, (October 1890); People v. Duke, 44 N.Y. Supp. 336, 19 Misc. Rep. 292 (1897); and State v. Carmean, 126 Iowa 291 (1905); four dealt primarily with the question of whether a corporation was liable for misdemeanors committed by its agents, State v. Morris & E.R. Co., 23 N.J.L. 360 (Sup. Ct. 1852); The Queen v. Great North of England Ry. Co., 9 Q.B. 315 (1846); State v. Great Works Milling & Man. Co., 20 Me. 41 (1841);

federal decisions cited are *United States* v. *Gooding*, 25 U.S. (12 Wheat) 460, 471 (1827), and *United States* v. *Mills*, 32 U.S. (7 Pet.) 138 (1833) (G.B. 15). Both involved special statutory aider and abettor provisions applicable to the specific offenses there involved, but obviously those do not apply to the Sherman Act.

Even if there had been any such applicable common law rule Congress certainly did not intend to apply it, as shown by the legislative history set forth above. Furthermore, there is no federal common law of crimes (Viereck v. United States. 318 U.S. 236, 241 (1943); Jerome v. United States, 318 U.S. 101, 104-105) (1943)) and Congress would not and could not have adopted such a rule unless it was set forth by statute. In Viereck v. United States, 318 U.S. 236 (1943) this Court said (241):

"One may be subject to punishment for crime in the federal courts only for the commission or omission of any act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

The Pharmaceutical Society of Great Britain v. The London and Provincial Supply Ass'n., Ltd., 5 Q.B.D. 310 (1880). Three were distinguished by the Government, itself, as involving liability without fault for nuisances committed by the corporation (G.B. 14, n. 6).

One of the holdings in *People v. Clark*, supra, is distinctly unfavorable to the Government. It held that the penal statute in question, which made "any person or corporation" violating the act liable, did not apply to the corporate officers of a railroad and dismissed two counts of the indictment in which they were so charged. To the same effect is Rex v. Hays, supra.

It is clear that the Government, by citing Gooding and Mills, supra, is in fact relying on an aider and abettor theory in the case at bar but without labeling it as such. This brings to the forefront the dilemma which the Government faces. Its reliance on an aiding and abetting theory is tacit recognition that "person" in the Sherman Act does not encompass corpe representatives. On the other hand, the Government does not wish openly to embrace the aider and abettor doctrine because Congress in 1914 specifically considered the aider and abettor doctrine with respect to corporate representatives and deliberately rejected it (see point III B, infra).

The only other argument the Government makes, in an attempt to counteract the plain meaning of the statute and the clear intent of Congress, is that after 1890, certain indictments and decisions dealing with individuals established the liability of corporate representatives under the Sherman Act. If the Government's premise were correct it would be directly contrary to the intent of Congress in 1890 and utterly inconsistent with the concurrent and constant consideration which Congress from 1890-1914 was giving to the desirability of bringing corporate representatives within the criminal penalties of the antitrust laws.

^{23.} The Government is unable to cite a case in the 71 year history of the Sherman Act up to the time of decision below which holds that a corporate representative is included within the definition of "person" in the Sherman Act.

But the Government's premise is not correct because it confuses individuals, who happen to have been corporate officials but were acting for their own account, with corporate personnel acting solely in a representative capacity on behalf of a corporation.

The Government next sets forth an appendix of forty antitrust cases intended to show frequent use of the Sherman Act against corporate officials. Examination of the appendix shows, however, that in only three contested cases were final convictions obtained (G.B. 18, n. 11). The Government neither discusses these three cases nor contends that the individuals there indicted were acting solely in a representative capacity. *Tribolet v. United States*, 11 Ariz. 436, 95 Pac. 85, 86-87, (1908) (G.B. 18, f.n. 11), the only reported opinion of the three, shows that the defendant along with others was acting in his own behalf and had organized and used a corporation to further his own ends.

The Government gives special consideration to certain other cases which it argues not only established the criminal liability of corporate representatives under the Sherman Act but left no doubt on the matter. An examination of these cases, however, reveals that either the individual was charged with acting in his individual capacity, using the "form and guise" of the corporation for his own ends, or the capacity in which he acted could not be decided on demurrer. None held that a corporate representative could be convicted under the Sherman Act.

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In 1912 the Government treated three of the principal cases it now relies upon, United States v. Winslow, 195 Fed. 578 (D. Mass. 1912), United States v. Swift, 188 Fed. 92 (N.D. Ill. 1911) and United States v. MacAndrews & Forbes Co., 149 Fed. 823 (S.D. N.Y. 1906) as being in the category of cases involving individuals who acted for their own account under the "guise" of a corporation (summary of argument in Winslow, 227 U.S. 202, 204 (1913)). The accuracy of this summary is substantiated by the Government's own interpretation of the Winslow case in its brief before the Supreme Court:

"The theory of the indictment is that the various defendants did the acts complained of, but did them through the device and instrumentality of corporations whose actions they controlled and directed and of which they (defendants) were the officers and moving spirit." (Government's Brief in *Winslow*, 3).²⁴

The indictment itself in the Winslow case, which significantly did not indict the corporation, charged that the individual defendants "carried on, directed and controlled . . . said trade and commerce . . . by the device and means of and through and in the names of said . . . corporation . . . and through certain other corporations which said defendants

^{24.} The Government implies that this Court's affirmance in Winslow was favorable to it (G.B. 26). This is not correct. The appeal to this Court was taken by the Government from the dismissal of several counts of the indictments. The dismissal was affirmed against the Government.

dominate and control." 195 Fed. 578, 591.25 (Emphasis supplied.)

Likewise in Swift, 188 Fed. 92 (G.B. 26-27), the indictment charged only the officers, and not the corporations, with engaging in antitrust violations on their own behalf through the "device" of corporations. The indictment stated that the individuals "carried on, directed and controlled said portion of said industry by the device of and means of, and through and in the names of certain corporations, of which they have been the principal owners and the only real managers." (Ind. No. 4509, p. 26)

Both Patterson cases, United States v. Patterson, 55 Fed. 605, 59 Fed. 280 (C.C. Mass. 1893) (G.B. 21-22), and Patterson v. United States, 201 Fed. 697 (S.D. Ohio 1912) rev'd 222 Fed. 599 (6th Cir. 1915) (G.B. 29-30), also involved indictments of individuals and not their corporation, National Cash Register Company, under the guise of which they were acting. In the first, the defendants were charged as individual conspirators and not as corporate officers, the court holding that their relationship to the corporation was inconsequential.

In the second *Patterson* case the only issue resolved concerned the uncertainty and duplicity of the indictment and its failure to charge an offense against the United

^{25.} See 229 U.S. at 203, for further recognition by the Government of the individual character in which the defendants were charged.

States. The district court recognized that the corporation was a pawn of the individuals, stating: "We are concerned with the alleged acts of these defendants. It is distinctly charged (page 10 of the indictment) that they are persons who controlled and directed the business and affairs of the said National Cash Register Company." 201 Fed. at 726. (Emphasis supplied).

In United States v. Greenhut, 50 Fed. 469 (D. Mass. 1892) and In re Greene, 52 Fed. 104 (C.C. Ohio 1892), which arose out of the same indictment, only individual defendants were charged with violating Sections 1 and 2 of the Sherman Act through utilization of the "form and guise" of a corporation. Both cases held that the indictment failed to charge an offense. In the Greenhut case the court declined to pass on the question of "whether the things charged against the defendants were not rather the doings of the corporation than of its officers," while in the Greene case, the court held that if the charges constituted a criminal offense, only the corporation was the "person," as defined in Section 8, which committed the crime.

United States v. MacAndrews & Forbes Co., 149 Fed. 823 (S.D. N.Y. 1906), (G.B. 22-24), the Government's principal case, did not hold liable corporate officials acting solely in a representative capacity. The court twice considered this point in the opinion and each time refused to treat the indictment as confining the charge to acts committed solely in a representative capacity. The court first considered the

matter under the issue of improper joinder. The court said:

"... This argument seems to depend upon the assumption that every factum set forth in the indictment is a piece of joint activity by all the defendants. This is not true. It is charged that the unlawful combination, conspiracy, or monopoly was the result of joint action, but all of the persons alleged to be jointly responsible were not necessarily all doing the same things at the same time. There is nothing inherently impossible in the corporations, doing one thing and the individuals another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labelled by the Act—combination, conspiracy, or monopoly . . ." (Id. 832).

The court subsequently added, in reply to the argument that only corporate acts were alleged, that "it cannot be ascertained upon demurrer whether the acts were all corporate acts or not . . ." (*Id.* 834).²⁶

The quotation relied upon by the Government (G.B. 22-23) cannot be helpful to its position because it enunciates the very dilemma mentioned above. As in the Greene case, the court referred to the definition of "person"

^{26.} The court distinguished between cases under statutes which made both the corporation and its officers criminally liable for a single act committed by the officer on its behalf, i.e. the Elkins Act, 32 Stat. 847 (February 19, 1903), and the MacAndrews case where both the corporation and the officer were charged with committing independent acts which when "dovetailed" together constituted a violation, thus recognizing the indictment as including a charge of individual action, apart from the corporation.

as including corporations; it declined to include individual defendants within that definition. As to individuals the court indicated that they could be indicted only as aiders and abettors. Evidently the district court failed to recognize that there was no federal common law of crimes and that such liability could only be based upon an act of Congress.

The subsequent trial in the *MacAndrews* case resulted in a conviction of the corporate defendants and an acquittal of the individuals (149 Fed. 836 (1907)). Apparently the evidence failed to show that the individuals acted on their own behalf in violation of the Sherman Act.

The court, in Union Pacific Coal Co. v. United States, 173 Fed. 737 (8th Cir. 1909), reversed the conviction of a corporate officer who had acted solely in his representative capacity. The court noted that the individual defendant was only an agent acting on behalf of his corporation; he therefore could not conspire with it. The court recognized the MacAndrews case as holding that corporate officials might be liable when they commit acts in their individual capacities which when combined with, the corporate acts produced an unlawful combination (173 Fed. at 745).

United States v. American Naval Stores Co., 172 Fed. 455 (C.C. S.D. Ga., 1909) (G.B. 25-26) was not an opinion of the district court but a charge by the court to the jury. This charge does not indicate that the individual defendants were alleged to have acted solely in a representative capacity. On

the contrary, this litigation shows that the Supreme Court regarded the question of Sherman Act liability of corporate representatives to be still an open and undecided question. The defendants in *American Naval Stores* appealed to this Court contending that their convictions under the Sherman Act should be set aside since all of their acts were performed on behalf of the corporations of which they were officers. *Nash v. United States*, 229 U.S. 373 (1913). In an opinion by Mr. Justice Holmes, this Court stated this contention of the corporate officers:

"It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them ought to be set aside. We need not consider . . . whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reserved for another reason" (Id. 379).

It is inconceivable that the Court would have made this statement if it had regarded the Sherman Act liability of corporate representatives as having been clearly established by the earlier cases upon which the Government relies so

heavily. While the Government professes to see nothing in Nash contrary to its proposition (G.B. 26), the Court's remarks are directly related to the matter in issue here. The argument was made by the individual defendants that the acts charged were corporate acts and if they amounted to a conspiracy "the corporations more clearly than anyone else were parties to it." The Court regarded this argument as having "a good deal of force." Then in the last portion of the quotation from the opinion, the Court specifically recognized that the individual defendants could have had an intent not shared by the corporations and might possibly be found guilty on this ground.

Thus, one year prior to the passage of Section 14, the Supreme Court treated the liability of corporate representatives as an open and undecided question.

III.

THE LEGISLATIVE HISTORY OF SECTION 14 SHOWS THAT CONGRESS CLEARLY INTENDED THAT THE CRIMINAL LIABILITY OF CORPORATE REPRESENTATIVES WOULD BE GOVERNED SOLELY BY THIS SECTION.

In 1914, when Congress enacted Section 14, its members acted pursuant to the understanding that the criminal liability of corporate officials acting in their representative capacity would be established for the first time and would be governed entirely by the new section. This understanding is plainly shown in the language of Section 14. It is expressed in the Congressional Committee reports on the

bill. And it is clearly shown in the debates. The understanding was entertained by Congressmen on all sides of the issue, regardles of some differing views as to the state of the prior law on the subject.

The Government states that Section 14 cannot be held to control the subject matter of this indictment unless "Congress had a 'clear and manifest' intent to repeal Sherman Act liability" (G. B. 33). In support, it attempts to invoke the principle that "repeals by implication" are not favored, citing United States v. Borden Co., 308 U.S. 188 (1939). But the principle has no application here. Appellee does not contend that Sherman Act liability was repealed by Section 14, for the simple reason that the Sherman Act, as we have shown, was not applicable to the situation involved. The only statutory provision which would have been superseded by Section 14 was the general federal aiding and abetting law enacted in 1909, if it was ever applicable. As we shall show, if that provision did apply to antitrust liability of corporate officers, Congress most certainly, expressly and unequivocally, rejected it and put it aside.

But in any event the principle that "repeals by implication are not favored" is not relevant to the issues on this appeal, because the reason behind it is completely absent. That principle is designed to prevent the destruction of substantive liabilities or rights created by prior statutes on the theory that they have been impliedly set aside by a later statute touching the same subject matter. Obviously, in such cases repeal will be assumed only on the basis of clear evidence of legislative intent. Thus, in the Borden case, defendants had urged and the trial court had held that the Agricultural Marketing Agreement Act, by its provisions for regulation of the milk industry, "destroys the operation of Section 1 of the Sherman Act." (308 U.S. at 198). On appeal, this Court defined the issue as whether there had been created by implication an "immunity" from the Sherman Act, with the result that commerce in agricultural commodities would be "stripped of the safeguards" of the antitrust laws against restraint of trade (Ibid.). The Court held that the field of regulation of the Act was not "coterminous with that covered by the Sherman Act" and that there was no evidence that Congress meant to supplant antitrust sanctions.

In contrast, no contention is made here that any immunity from the antitrust laws exists, or that their safeguards are in any way diminished. Section 14 is an antitrust law, which directly invokes and applies to corporate officials the substantive prohibitions applicable to others. It is clear both from its language and from its legislative history, that Congress in enacting Section 14 expanded the applicability of the antitrust laws by covering areas to which they did not theretofore apply. Accordingly, the principle represented by the Borden case is entirely inapposite.

The Government treats Section 14 as a sudden legislative aberration which had its source in 1911 (G.B. 34-35).

As we have shown however Section 14 was the culmination of a long process of legislative evolution going back to the inception of the Sherman Act and even before. It represented the end product of both the original efforts to include representatives in the Sherman Act and the subsequent numerous proposals from 1890 to 1914. This background forms an integral part of the legislative history and must be considered along with the events of 1914.

A. The Legislative History Shows That Congress Believed That Enactment of Section 14 Was Necessary and That It Would Control the Criminal Liability of Corporate Representatives in the Future.

The majority in Congress in 1914 believed that enactment of Section 14 was of great importance. The record shows that they intended this measure to be the basis for attaching what was commonly called "personal guilt" to corporate officers. The record of this belief is at the same time a record of belief that the Sherman Act either did not apply, or was of most doubtful applicability.

The Government's contrary interpretation comes from approaching the legislative history with the predetermined premise that the Sherman Act indisputably already applied to corporate officers in 1914 and that everyone in Congress understood this. Because of these assumptions, the Government naturally cannot find a sufficiently "clear and manifest" intent to repeal the supposed Sherman Act "liability."

Its premise, which is erroneous, conceals the correct interpretation.²⁸

When the history is viewed from the premise that the antitrust laws did not cover conduct of corporate representatives, and that for twenty-four years Congress had been considering proposals to include them, the debates take on an entirely different appearance. Quite naturally, intent to repeal is not manifest on the part of Congressmen who did not think that the Sherman Act presently applied to the subject matter, or who were in doubt or confused on that question. What is manifest, however, is that all Congressmen assumed that whatever new law was enacted would henceforth govern the subject. And it is equally manifest that Congress directly considered whether the

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The Government has supplied an 8-page appendix of quo-28. tations from the debates which it says constitute the "pertinent" legislative history (G.B. 72-80). But if the intent of Congress is to be determined from legislative history, nothing less than the whole history is "pertinent," and the Congressional intent in 1914 cannot accurately be ascertained without viewing the whole picture. Discussion of the question will be found in over 40 pages of Volume 51 of the Congressional Record, including: (1) in the House after introduction of the Clayton bill at 9074, 9079, 9080, 9169, 9185, 9198, 9201, 9202, 9261, 9595, 9596, 9608, 9609, 9610, 9675, 9676, 9677, 9678, 9679, 9680, 9681 and 9682; (2) in the Senate after the report of the Senate Judiciary Committee at 14214, 14225, 14226, 14323, 14324, 14325, 14326, 14327, 14328 and 14329; (3) in the Senate after receipt of the Conference Committee report at 15820, 15863, 15943, 15944, 16143, 16158; and (4) in the House after the Conference Committee Report at 16275, 16283, 16317, 16320 and 16321.

Sherman Act itself should furnish a future basis for liability, through the approach of prosecuting corporate officers for aiding and abetting corporate Sherman Act violations, and that Congress expressly and unequivocally voted down and rejected any such Sherman Act approach.

At the opening of the consideration of the Clayton Act, President Wilson gave a short, personal address to Congress, listing the chief matters which he hoped would be covered by the new legislation. One of the most important of his requests was for a law which would bring the individuals responsible for corporate violations within the scope of the antitrust laws. His statement on this subject also shows so plainly the general assumption of the nation's leaders that the Sherman Act did not then reach corporate officials who acted in a representative capacity that the part of the message dealing with this subject is quoted in full:

"Inasmuch as our object and the spirit of our action in these matters is to meet business half way in its processes of self-correction and disturb its legitimate course as little as possible, we ought to see to it, and the judgment of practical and sagacious men of affairs everywhere would applaud us if we did see to it, that penalties and punishments should fall, not upon business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn. [Applause.] Every act of business is done at the command or upon the initiative of

some ascertainable person or group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they make illegal use. It should be one of the main objects of our legislation to divest such persons of their corporate cloak and deal with them as with those who do not represent their corporations, but merely by deliberate intention break the law. Business men the country through would, I am sure, applaud us if we were to take effectual steps to see that the officers and directors of great business bodies were prevented from bringing them and the business of the country into disrepute and danger." (51 Cong. Rec. 1979)

The administration supported the Clayton bill on this subject. The original version of Section 14 appeared as Section 12 in the bill (H.R. 15657, 63rd Cong., 2d Sess. 1914). The report of the House of Representatives Committee on the Judiciary accompanying the bill explicitly reflects the understanding that this section will govern prosecutions of corporate officials. It described the section as follows:

"PERSONAL GUILT.

"Section 12 is the personal guilt provision of the bill. It provides that whenever a corporation shall be guilty of a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation, and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered,

or done any of such prohibited acts shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished as prescribed in the section" (H. Rep. No. 627, 63rd Cong. 2d Sess. 20 (1914); emphasis supplied).

The Senate Judiciary Committee's report on its version of Section 14, was even more explicit that the new law would establish and govern the liability of corporate officials. The Report stated:

"Existing antitrust acts are further supplemented by a provision that whenever a corporation shall violate the antitrust acts such violation shall be regarded as that also of the individual directors and officers of the corporation who shall have authorized, ordered, or committed any of the acts constituting such violation, thus fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law" (S. Rep. No. 698, 63rd Cong., 2d Sess. 1-2 (1914); emphasis supplied).

The Government's only substantial response to these statements in both Committee reports is that they do not contain an expression of intent to repeal the supposed existing Sherman Act criminal liability of corporate officers. (G. B. 42-43) Quite naturally, committees of Congress which had been asked by the President to provide a punishment for corporate officials not provided by existing law would not be speaking of repeal of existing law. Neither do the reports acknowledge that the Sherman Act was applicable, as the Government contends, but pro-

ceed with the business of providing the law on the subject. If they had any other purpose than to determine the law through Section 14, none is revealed. Their words should be taken at their plain, face value: corporate officials were henceforth to be "punished as prescribed in this section," (House Report) which was passed for the purpose of "fixing the personal guilt" of such officials (Senate Report).

Although the language of the statute and the committee reports both make reference to the debates unnecessary, it is clear that the debates in both houses of Congress, when viewed as an entirety, and not in terms of isolated excerpts, show a basic understanding on the part of the majority leaders that existing law was deficient and that the new statute would be the governing law on the subject.

At the outset of the debates in the House, the new chairman of the Judiciary Committee, replacing Representative Clayton was Representative Webb. Mr. Webb introduced what later became Section 14 by summarizing the provisions of the section and quoting from President Wilsons' address. He stated:

"In this section we have attempted to make guilt personal, and we believe we have succeeded in doing so" (51 Cong. Rec. 9074).

Chairman Webb did not say that the intention was to add to, or supplement, some kind of existing Sherman Act coverage of corporate representatives. He said that the plan was "to make guilt personal."

Later in the House debates, as the Government has pointed out (G. B. 36), concern was expressed that under the wording of the original bill, which began, "Whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws," it would be necessary, as Representative Mann put it, "to find the corporation guilty before any of them can be convicted" (51 Cong. Rec. 9609). (See also remarks of Representatives Beall, Id. 9677 and Towner, Id. 9679). This concern occupied a major part of the total House discussion of the section. It is most unlikely that this much concern would have been manifested unless it was assumed that whatever bill was finally enacted would govern the prosecution of corporate officials. Mereover, there would be no basis for such concern if the Sherman Act already covered these corporate representatives.

The problem was finally resolved by adoption of an amendment by Representative Lenroot which was in the language now found in Section 14 (Id. 9682). Instead of a requirement that the corporation be "guilty," the statute as amended reads, "Whenever a corporation shall violate" any of the penal provisions of the antitrust laws. In agreeing to this amendment, Representative Webb again stated that what the spensors wished was "to make guilt personal,"

and he believed that this statute would do that. (Id. at 9681).

Belief in the need for Section 14 to deal with the problem was repeatedly stressed by others. Representative Helvering stated that "the greatest weakness in our law comes from the punishment of corporations and neglect to locate and punish personal guilt" (*Id.* 9185). Representative McGillicuddy, a member of the Judiciary Committee, called the new section "one of the most necessary and important remedies in the whole bill" (*Id.* 9261). Representative Hulings stressed the same great need (*Id.* at 9678).

Probably none on the majority side in the House believed more strongly in the need for this new provision than Representative Floyd, a member of the Judiciary Committee and one of the spokesmen for the bill. It is therefore a great irony that the Government has virtually adopted him as the purported spokesman for its view and has sought to use some of his statements to support its argument that the new law was not needed, and that it added so little to the prior law that the precise addition made cannot even be described.

It has already been pointed out, supra, p. 16 that Representative Floyd stated that this bill was greatly needed in order to prosecute officials who "authorize" or "order" corporate violations, i.e. to reach persons who have done pre-

cisely what the indictment in this case charges appellee with doing. According to Mr. Floyd, who made this point over and over in the debates, it was not possible under existing law to reach such officials.

Mr. Floyd stated:

"The purpose of this section is to enable the Government, when it has convicted the corporation, to reach those responsible officers who have been proven in the trial to be guilty of a violation of law by presentment of an indictment and trial. It authorizes their conviction not only for acts done but for acts authorized or ordered to be done***" (Id. 9679; emphasis added).

Thus it is clear that Mr. Floyd fully understood that Section 14 was to cover all three categories of conduct, i.e., authorizing, ordering and doing. The Government has not explained how a Congressman who felt this strongly about the need for the new law could at the same time entertain the views attributed to him by the Government's interpretations.

Similarly, in the debates in the Senate, the chairman of the Senate Judiciary Committee, Senator Culberson, made the Congressional intent to control corporate officials through this law as explicit as it could be. In the following important colloquy, he stated that this section would provide for "personal guilt." In direct response to questions, he stated further that the Sherman Act did not

reach corporate officials and that this section "is intended to supply that deficiency":

"MR. CULBERSON. This is the personal-guilt section of the bill. The committee thought that the language employed by the amendment was the more direct way of reaching the same result as that contemplated by the House provision."

* * * *

"MR. CULBERSON. The Sherman Act provides the penalty where the corporation acts, and it is against the corporation. This provision penalizes the individuals who act for the corporation and is, as it has been very often termed, the personal-guilt portion of this bill.

"Mr. Kenyon. The Senator does not claim that section 1 of the Sherman Act does not penalize the individual?

"MR. CULBERSON. What I mean to say is this: Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that act, the guilt of that corporation would not be visited upon the individual director or agent or officer who authorized or committed or induced the act. This section is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation."

"MR. KENYON. I think that is a good purpose, if it is carried out" (Id. 14324; emphasis supplied).

The question of Mr. Kenyon that "The Senator does not claim that Section 1 of the Sherman Act does not penalize the individual?" does not mean what the Government implies (G.B. 37 n. 18) but refers to the admitted fact that individuals were subject to the Sherman Act if not acting as representatives of a corporate entity. This is clearly shown by Senator Kenyon's satisfaction with Senator Culberson's answer to his question, as quoted above and Senator Kenyon's understanding, expressed shortly before, that, "section 12, if that is the personal-milt section, does not in any way apply to individuals except as the individuals are officers or directors of corporations" (51 Cong. Rec. 14324).

We have summarized above and quoted from the principal Congressional statements which urged that there was a need for the new law because of the inadequacy or failure of the old law to reach the special problem posed by corporate officials. These statements all rest on the obvious premise, sometimes explicit, sometimes implicit, that the Sherman Act was inadequate to cover the matter. Nor was this premise a new one. On the contrary it was persistent and ever present during the twenty-four year period of legislative proposals leading up to Section 14.

The Government, despite this record, makes the contrary claim that all but one of the Congressmen who spoke on Section 14 in the debates "recognized the existing Sherman Act liability of corporate officers actively participating in an offense" (G.B. 37-38 n. 18, 19). This generalization and its supporting note are decidedly in error. First, the Government has not listed a number of Congressmen

who spoke on Section 14 during the debates, including Representatives Fess (51 Cong. Rec. 9080), Helvering (Id. 9185), Taggart (Id. 9198), McGillicuddy (Id. 9260-9261), Mann (Id. 9609, 9675 et seq.), Beall (Id. 9677), Metz (Id. 9609), Bryan (Id. 9680 et seq.), McCoy (Id. 9679 et seq.), and Hulings (Id. 9678), and Senators Jones (Id. 14325-14326), Chilton (Id. 14326-27), Nelson (Id. 15943-44) and Martine (Id. 14325).

Furthermore, several of the members of Congress not listed by the Government made statements which either expressly contradict the Government's generalization or are implicitly inconsistent with it. For example, Representative Fess stated: "I did not know that the Sherman antitrust law provided that if the corporation was found guilty of violating the law, that guilt would also be deemed to apply to the directors." (Id. 9030). The statements of Representatives Helvering, McGillicuddy, and Hulings have been referred to above. Senator Martine said. "I will vote for establishing the personal guilt and for the personal punishment of these men. . ." (Id. 14325). Senator Jones exhibited a similar frame of mind (Id. 14326). Senator Chilton also did so, when he said, "This law does make crime personal." (Id. 14327).

Moreover, the Government claims support from Congressmen whose remarks cannot fairly be interpreted in this manner. For example, Representative Campbell made no affirmative statement; he merely asked a question (Id.

9201). Representative Webb, in the colloquy cited, did not say anything to support the Government contention; indeed, he said; ". . . and that is the only way in which we have undertaken to amend the Sherman antitrust law at all—that is, in making guilt personal" (*Id.* 16275). There seems no basis for claiming that Representative Barkley (*Id.* 9681) or Senator Cummins (*Id.* 14328) made any statement favorable to the Government contention.

Most of the other Congressmen and Senators cited by the Government had the common denominator of being in the minority and opposed to the bill, largely for the reason that it was not strong enough. The views and actions of these Congressmen, however, give no support to the Government contention concerning the intent of Congress. Indeed, the issue which they precipitated in Congress resulted in a crystal-clear manifestation of Congressional rejection of the theory here urged by the Government. In a negative reaction to the minority position, the majority of Congress flatly expressed an intent opposite to theirs. In thus acting, Congress as a matter of record repudiated the position taken by the Government here.

Representative Floyd's remarks, so heavily stressed by the Government to the virtual exclusion of all else in the legislative history, fully support appellee's position. They provide no support for the theory that the Sherman Act was then believed by the majority of Congress to reach the corporate official acting only in his corporate capacity, as distinguished from the corporate official who acted individually, or who was in fact the corporation itself. As Mr. Floyd said in language which was characteristic of his thinking:

"But if the individual independently had violated the Sherman law and was guilty of violation of it in any way as an individual, he could be convicted without ever convicting the corporation. . . ." (Id. 9679; emphasis supplied; see also Id. 9676).

This states exactly the distinction between the application of the Sherman Act which did cover individuals acting "independently" and for their own account and the application of Section 14 which was to cover for the first time individuals acting *not* "independently" but as corporate representatives authorizing, ordering or doing corporate acts.

B. Congress Rejected Aider and Abettor Prosecution of Corporate Representatives Under the Sherman Act and Also Under Any General or Special Statutory Provisions.

Congress in 1914 expressly rejected the "aiding and abetting" doctrine for prosecution of corporate representatives in antitrust cases. The Government in this case has not expressly relied on an aider and abettor theory, but as pointed out above, it has sought tacit support from the theory. The Congressional treatment of this subject matter in 1914 therefore assumes particular importance.

When Congress was considering the adoption of Section 14, the aiding and abetting doctrine played a prominent part in its deliberations. The opposition to Section 14 and the espousal of aiding and abetting by the minority in Congress took three forms. It was contended that Section 14 was unnecessary because of the general aiding and abetting provisions of the Criminal Law (51 Cong. Rec. 9079-80, 9201, 9677, 16283). It was also proposed that if special provision was to be made for antitrust violations by corporate representatives, a separate offense should not be established but an aiding and abetting section should be adopted applicable to antitrust violations similar to that contained in the Interstate Commerce Act (the Volstead amendment). Finally, in the Senate it was proposed that Section 14 be adopted but broadened to include aiding and abetting (S. Report No. 698, 63rd Cong., 2d Sess. 74 (1914)).

In the House, Representative Volstead contended that Section 14 was unnecessary (51 Cong. Rec. 9680, 9681, 16283). Failing to convince the House of this he offered an aider and abettor amendment which, unlike Section 14 creating a separate offense, made all aiders and abettors subject to the substantive provisions of the antitrust laws as in the Interstate Commerce Act²⁹ (Id. 9676). Representative

^{29.} The Volstead proposal was: "Any person who shall do, or cause to be done, or shall willingly suffer r permit to be done any act, matter, or thing prohibited or declared to be unlawful in the antitrust laws or shall aid or abet therein, shall be deemed guilty of such prohibited and unlawful acts, matters, and things and shall be subject to the punishments prescribed therefor in the antitrust laws" (51 Cong. Rec. 9676).

Green remarked that this amendment embodied the general principles of the aider and abettor statute (*Id.* 9677, 9678).

The majority in the House was opposed to the aider and abettor amendment. Mr. Floyd voiced their objections:

"I have several objections . . . I think it is indefinite . . . drastic and goes too far. It not only proposes to make unlawful the act of any person that aids and encourages but also makes unlawful the acts of those who assist in any way those who violate the antitrust laws" (51 Cong. Rec. 9676).

The House thereupon voted upon and rejected the Volstead amendment (*Id.* 9678). On the same day, it adopted the Clayton bill provision, as revised by the Lenroot amendment (*Id.* 9682).

In the Senate, it was first proposed that Section 14 be adopted but broadened to include aiding and abetting (S. Rep. No. 698, 63rd Cong., 2d Sess. 74 (1914)).³⁰

A Conference Committee rejected the Senate aider and abettor version and accepted the House version of Section

^{30. &}quot;That every director, officer, or agent of a corporation which shall violate any of the penal provisions of the antitrust laws, who shall have aided, abetted, counseled, commanded, induced, or procured such a violation, shall be deemed guilty of a misdemeanor, and upon conviction thereof of any such director, officer, or agent, he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or both, in the discretion of the court." (Emphasis supplied)

14 with minor changes. The minority continued to attack Section 14 and criticized the Conference Report. Mr. Volstead, leader of the House opposition stated:

"The Criminal Code has this provision: [reading the Federal aiding and abetting statute]³¹

"That broad and comprehensive language is to be supplanted by Section 14, and here is the language: [reading it].

"Under the language of this new section only those who authorize, order, or do any of the acts forbidden are guilty, while under the present law not only are those guilty but in addition all who abet, counsel, induce, or procure the commission of the act, whether they authorize or command it or not. The penalty in this new section is exactly the same as in the present Sherman law. There is no increase in the penalty. The effect of this section is to relieve persons now liable to the penalties of the Sherman law . . ." (Id. 16283). See also Id. 9676, 9681.

Senator Nelson, one of the leading minority conferees, called attention to both the general aiding and abetting statute and the language of the Senate version which was taken from that statute. During the debate on the Conference Report he said:

"There we had the most comprehensive and drastic language . . . while the language found in the conference report limits the offense, so that in many cases officers and directors, if they are careful not to come

^{31. 35} Stat. 1152 (1909), 18 U.S.C. § 2.

out in the open and give and order . . . [or] authorize the act . . . [or] do the act themselves, will be immune and cannot be punished. Under the drastic language of the Criminal Code nothing further was needed . . . than that section of the Code . . . Senators can see how the change of that language dilutes and diminishes the force and effect of the entire provision. The provision of the Criminal Code is ample to cover the offenses of officers and directors in such cases, and hence there is no need for such a section as Section 14, and if the section remains in the bill it ought to have the scope and vigor of the Criminal Code, and not be weakened and diluted as it is in the bill" (Id. 15944).

The various aider and abettor provisions were fully debated and Congress was thus fully aware of the doctrine and the various ways in which it might have been made applicable to antitrust violations by corporate representatives. Nevertheless Congress decided to adopt the specific language of Section 14, limiting violations to "authorized", "ordered", or "done", and rejecting reliance upon or the use of the aiding and abetting doctrine in any form. The outspoken stand taken by opponents to Section 14, as evidenced by their efforts to defeat and amend it and their constant admonitions that Section 14 was more limited than the general aiding and abetting statute, are implicit recognition that Section 14 would be controlling as to the liability of corporate directors, officers and agents acting on behalf of the corporation.

Section 14, being a specific enactment on the subject matter, prevails over the general aiding and abetting provisions of the Federal Criminal Law which might otherwise have been controlling, Kepner v. United States, 195 U.S. 100, 125 (1904). See also D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932); MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944). "A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed." Cook County Nat'l. Bank v. United States, 107 U.S. 445, 451 (1882).

A similar statutory question arose in *United States* v. *Lucas*, 114 F.Supp. 583, 584 (N.D. W.Va. 1949) when defendant was convicted of aiding and abetting the escape of several prisoners incarcerated in a federal penitentiary. As a principal he was sentenced to five years under the Act. Recognizing that the Federal Escape Act provides a specific aider and abettor provision with a maximum three-year sentence, the court held that the Department could not proceed under a general statute for a crime which is covered by a specific one.

If Congress had desired Section 14 to be broader and more encompassing it would have enacted an aider and abettor provision as a part thereof. It did just this in Section 10 of the Clayton Act where directors, agents, managers, and officers of common carriers who aid and abet the com-

mission of a wrongful act set forth in that section, are made liable to criminal punishment as well as the carrier. 15 U.S.C. § 20.

As recognized in *United States* v. *Dotterweich*, 320 U.S. 277 (1943) the intention of Congress must govern as to the applicability of the general aider and abettor statute. See *Sherman* v. *United States*, 282 U.S. 25 (1930), cited therein. Congress has made this intention unmistakably clear by adopting Section 14 and rejecting aider and abettor in any form.

In summary, the legislative history, when viewed in its entirety, instead of in terms of a few isolated excerpts, clearly shows that the majority in Congress: (1) did not believe that the Sherman Act applied to the actions of ordinarily corporate officials acting within the scope of their employment; (2) specifically rejected aider and abettor provisions under the Sherman Act and also under any other general or special statutory provisions; and (3) adopted a carefully-worded and deliberately limited Section 14 which they certainly intended to govern exclusively the antitrust prosecution of corporate representatives.

IV.

THE QUESTION PRESENTED HERE AROSE WHEN CON-GRESS INCREASED SHERMAN ACT PENALTIES IN 1955. NO COURT PRIOR TO THE DECISION BELOW HAD DECIDED THE QUESTION.

The action of Congress in 1955 in raising fines under the Sherman Act but not under Section 14 of the Clayton Act brought into sharp focus the problem of criminal antitrust charges against corporate representatives. Thereafter it became of vital importance to a corporate representative to determine whether he was subject to a fine of \$5,000 under Section 14 of the Clayton Act, or \$50,000 under Section 1 of the Sherman Act. In the forty-one years prior to 1955, when the maximum fines under the two sections were exactly the same, there was no occasion to raise the issue, and consequently, it had not been raised or decided during that time. The failure to raise the issue when it was purely academic is, as the lower court held, "of little significance" (196 F. Supp. at 157).

In Boyd v. Alabama, 94 U. S. 645, 648 (1876), the court said:

"Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. * * *"

The Government contends, however, that it is improbable that corporate officials would not have sought dismissal of Sherman Act indictments against them if Section 14 was the sole method for prosecuting them. On the contrary it is highly improbable that any individual cor-

porate official would have raised the issue and certainly none of them did. An individual saddled with the anxiety and expense of defending against an antitrust indictment could hardly be expected to volunteer to finance a test case to determine whether he should be subject to liability under Section 14 instead of Section 1 when the penalty under the former was exactly the same as the penalty under the latter and the only victory would be an academic one.

In essence the Government's position is exactly the same as that of Congressman Volstead and his supporters who were the minority in Congress and were opposed to the enactment of Section 14. The Government's persistence in ignoring Section 14 during the period when individual defendants would have had nothing to gain by raising the issue cannot foreclose the matter.³²

Following the enactment of Section 14 there have been a few cases which have referred to it and some have expressed, collaterally, an opinion as to the section's meaning or purpose. Of these cases the only one that recognized and applied the distinction involved here is *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945).

^{32.} Compare for example, Bruce's Juice, Inc. v. American Can Ca., 330 U.S. 743, 750 (1947) and Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954), to Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), where, until the right to bring a treble damage action for violation of Section 3 of the Robinson-Patman Act was specifically challenged and denied, the right was assumed to have existed.

Hartford-Empire was a civil case. The pertinent point was the Supreme Court's consideration as to whether injunctions should be issued against the individual defendants who were corporate officers. The Court held that the injunctions should not issue against the individuals to enjoin the corporate violations. It expressly recognized the two capacities in which a corporate official might act—"on behalf of or in the name of a corporate defendant", or "as individuals acting for their own account." The Court found that the individual defendants had acted solely in a corporate capacity and held that there was therefore no need to enjoin them personally, saying (323 U.S. 386, 434-435):

"That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal."

^{33.} The Court said (323 U.S. 386, 433-434): "A word should be said concerning the inclusion in many paragraphs of the decree, and in many of the injunctions imposed, of various individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants, They offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant. There are no findings, and we assume there is no evidence, that any of them have applied for, owned, dealt in, and licensed patents appertaining to the glassware art. Nor is there evidence or finding that, as individuals acting for their own account, any of them, as a principal, has entered into any of the arrangements found unlawful by the court." (Emphasis supplied).

The importance of Hartford-Empire is this: It is the only case between 1914 and 1961 which recognized (with respect to antitrust violations involving corporate officials) that there was a material distinction between such officials acting individually and for their own account and corporate officials acting solely in a representative capacity. In Hartford-Empire the Court found, unlike the cases upon which the Government relies, that the corporate officials were acting solely in a representative capacity. Having so found, and considering in passing, the possible criminal liability of the corporate officials, the Court settled on Section 14 as the applicable criminal section. The Court then used this same finding as the basis for its holding that it was unnecessary to enjoin the corporate officials as individuals in order to prevent further corporate violations, saying in effect that it was enough to enjoin the office or position rather than the man.34

An examination of the cases cited by the Government will show that in none of them did the court decide, or consider that it was called upon to decide that Section 14 instead

^{34.} United States v. Vehicular Parking, Ltd., 54 F. Supp. 828 (D. Del. 1944) (G.B. 58-59, n. 25) is not in point. Unlike Hartford-Empire it involved individuals acting for their own account. This is shown by the facts stated in the original opinion (54 F. Supp. 828, at 831) and by two later opinions which the Government does not cite, the first recognizing that the individuals were not acting as corporate representatives (56 F. Supp. 297, at 297), the second (61 F. Supp. 656 at 657) indicating that the facts were distinguishable from those in Hartford-Empire.

of Section 1 should apply to corporate officials acting solely in a representative capacity.

The first cases relied on by the Government are the group arising out of the National Malleable indictment (G.B. 52-55). All but one of the cases in this group were criminal removal cases. The principal case was United States v. National Malleable & Steel Castings Co., 6 F.2d 40 (N.D. Ohio, 1924). In this case the district court upheld indictments against 52 corporate defendants and 49 individual defendants. The defendants did not contend, however, that the indictment improperly charged them under Section 1 because Section 14 was the exclusive section applicable. This is readily apparent from the court's statement of the case (p. 41):

"In support of the motion to quash and the demurrers to the indictments, the *same objections* are urged alike by the individual and corporate defendants." (Italics supplied).

The objections raised by the corporations and the defendants challenged generally the sufficiency of the indictment but did not make any challenge such as that here.

The related removal cases did not and could not pass on such a question. They involved only the validity of the removal proceedings and not the issues raised by the demurrers to the indictment in the main case. As stated in one of the removal cases, *United States* v. *Mathues* 6 F.2d 149, 151 (E.D. Pa. 1925):

"As to all of these matters, however, doubtful or disputed questions, whether of fact or of law, are not to be considered upon an application for a warrant of removal."

Each of the other removal cases is in accord with the above statement.

Three conclusions can be drawn from the group of National Malleable cases. First, in none of them was the court asked to decide—nor did it decide—whether Section 14 rather than Section 1 applied to corporate representatives; second, all but one of the cases were criminal removal cases where the only issue was the validity of removal; third, despite the absence of any statutory citation in the indictment and the absence of any issue as between Section 14 and Section 1, several of the courts spontaneously adverted to Section 14 as being the logically applicable section for corporate representatives.

Thus, far from being authority for the Government's position, the *National Malleable* cases, as a group, lean the other way. The preliminary recognition which some of those cases gave to Section 14 was the precursor of the clear-cut recognition accorded twenty years later by *Hartford-Empire*.

The Government relies heavily on *United States* v. *General Motors Corporation*, 26 F. Supp. 353 (N.D. Ind. 1939). The indictment there alleged a conspiracy in restraint of trade but did not cite any section of the antitrust laws as having been violate... The indictment did not allege in what

capacity the individual defendants were acting, much less that they acted solely in a representative capacity. The charging portion of the indictment did not differentiate between corporate and individual defendants.

The district court in *General Motors* was not faced with the issue presented here and did not decide it, and did not even mention Section 14.³⁵

The portion of the opinion dealing with the individual defendants consists of twelve lines and was directed to a duplicity argument. This is shown by the last line of that portion of the opinion (which the Government does not quote): "This does not render the indictment duplicitous." (26 F. Supp. 355). The duplicity argument has no perti-

^{35.} This was undoubtedly because the General Motors defendants abandoned the Section 14 argument made in their original brief. In the Government brief in response to the General Motors original brief, the Government stated that it did not rely on Section 14 but that the General Motors indictment was based on Section 1 of the Sherman Act. In the General Motors Reply Brief the defendants accepted that statement saying, "This indictment is admittedly based on a violation of Section 1 of the Sherman Act only and is claimed to charge a single conspiracy in restraint of trade on the part of the defendants both corporate and individual." (General Motors Reply Brief, p. 44; emphasis supplied).

The Government's Supplemental Brief, responding to the General Motors Reply Brief, recognized this abandonment (Govt. Supp. Br. in *General Motors*, pp. 28-29).

^{36.} The duplicity argument was based on defendants original belief that the indictment charged the corporations under Section 1 and the individuals under Section 14. They did not claim that the individuals were charged under both sections. That this was their argument was made clear by the footnote on page 45 of the General Motors Reply Brief.

nence here. The defendants did not contend that they should have been charged under Section 14 instead of Section 1 and they did not contend that they could not be charged under Section 1 (see n. 35 above).

Furthermore, the court did not find that the individual defendants were charged with acting only in a representative capacity. Quite the contrary. Explicit in the court's decision is a refusal to treat the charge as confined to "their conduct as such officers" (Id. 355). The Government itself stated that their designation as officers or agents was "merely descriptive" (Govt. General Motors Brief 69).

In the case at bar, on the other hand, the issue presented is limited by the Government's bill of particulars specifying that appellee acted solely "in his capacity as an officer" (R. 34, 35). Clearly General Motors did not consider or decide such an issue.

The Government cites United States v. Atlantic Commission Company, 45 F. Supp. 187 (E.D.N.C., 1942) (G.B. 58-61), as the only other decision in a criminal case (prior to the 1955 amendment to the Sherman Act) which purportedly referred to Section 14. Atlantic Commission was another case involving a claim of duplicity arising from defendants' construction of the indictment as charging "also a violation of Section 14" (45 F. Supp. 187, 193).

As in General Motors the duplicity argument presented a wholly different issue from the one in the case at bar. Here the indictment is under the Sherman Act and appellee Wise has not construed it as also charging him under Section 14. Instead, he contends that he can not be charged under Section 1 for acting solely in a representative capacity. In General Motors and Atlantic Commission, the defendants did not contend that they could not be charged under Section 1, but argued that they were being improperly charged under Section 14 in a count which also contained a Section 1 charge.

In Atlantic Commission, the court found that the indictment did not purport to charge an offense under Section 14. There was no bill of particulars in Atlantic Commission specifying that the individual corporate officers were acting solely in a representative capacity. Nor was the court asked to decide whether corporate officials acting solely in a representative capacity, could properly be charged under Section 1 of the Sherman Act. The court's express reliance upon and quotation from General Motors is a clear recognition (1) that the charge against the individual defendants did not relate to "their conduct as such officers" (45 F. Supp. at 195), and (2) that the duplicity issue was the same as in General Motors, which is an issue far removed from the issue here.³⁷

^{37.} The opinion in Atlantic Commission does not indicate what the duplicity point was. Instead of making the General Motors

The increase in Sherman Act fines in 1955 not only gave rise to the issue here, but also gave additional support to the proposition that Section 14 was intended to be the exclusive section applicable to cor orate personnel acting solely in a representative capacity. The 1955 action does not in any way support the Government's position (G.B., 63-67).

The 1955 legislative history shows that the purpose of Congress was to punish large corporations more severely. Both the Senate and House Reports stated that the Sherman Act penalty of \$5,000 was "insignificant monetarily" as a punishment for large corporations with vast assets (S. Rep. No. 618, H. Rep. No. 70, 84th Cong., 1st Sess. 1955), 38 thus implying that there was a real need to raise the penalty as to them. Both Reports made it absolutely clear that they were not concerned with punishment of corporate officers. For example, in explaining that only the fine is increased and not the term of imprisonment, these reports stated that "inasmuch as most cases involve the acts of corporations rather than individuals, the punishment of imprisonment

duplicity point (n. 36 above) the individual defendants in *Atlantic Commission* may have contended that they were being charged under both Sections 1 and 14 in one count. If so, the point is equally far removed. Inherent in such a claim would be a concession that they could properly be charged under both sections. Appellee Wise makes no such concession here.

^{38.} This Report was regarded as an additional argument against the Government in *United States* v. A. P. Woodson Company, 198 F. Supp. 582, 584 (D. D.C. 1961).

cannot be invoked"⁸⁹ (S. Rep. at 2, H. Rep. at 3). This was a clear recognition that acts of the corporation did not subject its representatives to the penalties of the Sherman Act. Thus when these Reports speak of increasing the monetary penalty as the only means of punishing corporate violations of the Sherman Act, they were not considering punishment of corporate officers, and in fact were impliedly recognizing that under the Sherman Act only the corporate entity can be punished for a violation thereof.

In the House of Representatives Mr. Lane stated: "Corporation officials will think twice before they defy the law because heavy fines would bring down upon them the wrath of the stockholders who would observe losses that could never be explained" (101 Cong. Rec. 3946). Failure to mention the much more serious deterrent of indictment and personal pecuniary loss negatives the Government's theory that these heavy fines were intended to be invoked against corporate officials.

The Government seeks to alter the impact of the 1955

^{39.} As the Government should have recognized, reference to "individual" in these Reports refers to the individual businessman acting in his own capacity (Govt. Br. p. 65-66). This is further verified by the fact that "acts of the corporation" in the above quotation are clearly distinguished from the acts of individuals, which, if the latter were corporate representatives, would have been "acts of the corporation." The portion of the House Report quoted by the Government (G.B. 66) immediately follows the above quotation and clearly, therefore, refers to individuals who do not act as corporate representatives.

legislative history by reliance on remarks made five years earlier by the Assistant Attorney General to the House Subcommittee studying monopoly power in 1950 (G.B. 63-64). This has no significance. The remarks were directed to a bill which would have raised the fine in both the Sherman Act and Section 14 of the Clayton Act to \$50,000. The spokesman stated that the Justice Department was primarily interested in Section 1 of the bill which raised the fine for violation of the Sherman Act. The Department may have known why it was "primarily interested in Section 1," but there is nothing to show that it told Congress why. Nor was any light shed on the subject by the Department's statement that it did not care whether its proposal as to Section 2, increasing the fine of Section 14, was accepted or not.

There was in these remarks no mention of corporate representatives and no claim that the Sherman Act as well as the Clayton Act covered them. This item of legislative history surely does not illuminate the inchoate intent of Congress in 1950, much less the intent of Congress in 1955.

Congressman Celler made it clear that the House in 1950 proposed no increase in the Section 14 penalty not for the reason the Government intimates (G.B. 64-65), but because "we want to get the bill through. We did not wish to encourage too much opposition by including acts other than the Sherman Act. We want to be practical. We want a bill passed with widest area of agreement. We are willing

to make progress slowly. Let us increase the penalties under the Sherman Act, which is the most important of all the acts. Then subsequently we may consider the other acts." 96 Cong. Rec. 8071. The Government omits this portion of Mr. Celler's statement quoted in its brief.

The action of Congress in 1955 created a situation which, for the first time, made it of vital importance to a corporate representative to determine whether he was subject to a fine of \$5,000 under Section 14 of the Clayton Act, or \$50,000 under the Sherman Act. In 1961, the issue thereby created was raised and decided and became this "important question of first impression" (Government's Juris. State. 5).

CONCLUSION

It is therefore urged that the decision of the district court dismissing the Sherman Act counts (Counts 11 and 12) of the indictment as to appellee Wise be affirmed.

Respectfully submitted

JOHN T. CHADWELL
RICHARD W. McLAREN
JAMES A. RAHL
JAMES E. HASTINGS
RICHARD M. CALKINS
135 South LaSalle Street
Chicago 3, Illinois

Of Counsel:

CHADWELL, KECK, KAYSER, RUGGLES & McLAREN

> MARTIN J. PURCELL 1701 Bryant Building Kansas City 6, Missouri

Of Counsel:

MORRISON, HECKER, BUCK & COZAD

JOHN H. LASHLY 705 Olive Street St. Louis 1, Missouri

Of Counsel:

LASHLY, LASHLY & MILLER

Attorneys for Appellee

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